2007 Legal Update

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

2007
LEGAL UPDATE

TELECOURSE REFERENCE GUIDE

THE MISSION OF THE CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING IS TO CONTINUALLY ENHANCE THE PROFESSIONALISM OF CALIFORNIA LAW ENFORCEMENT IN SERVING ITS COMMUNITIES

Published 2006

For additional information contact:

California Commission on Peace Officer Standards and Training
TRAINING PROGRAM SERVICES BUREAU
1601 Alhambra Boulevard
Sacramento, CA 95816

COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

COMMISSIONERS

Anthony W. Batts	Chief Long Beach Police Department
Lai Lai Bui	Detective Sacramento Police Department
Collene Campbell	Public Member
Robert G. Doyle	Sheriff Riverside County
Roosevelt Johnson	Sergeant Los Angeles County Sheriff's Department
Deborah Linden	Chief San Luis Obispo Police Department
Ron Lowenberg	Director Golden West College
Nelson C. Lum	Sergeant San Francisco Police Department
Henry Perea	Councilman City of Fresno
Bill Lockyer, Attorney General	Ex Officio Member Attorney General's Office
Kenneth J. O'Brien	Executive Director

TABLE OF CONTENTS

Table of Contents (Continued)

Table of Contents (Continued)

II. FIREARMS LAW

III. TRAFFIC LAWS

Table of Contents (Continued)

IV. CASE LAW

SEARCH & SEIZURE LAW

Table of Contents (Continued)

Table of Contents (Continued)

INTERROGATION LAW

MISCELLANEOUS

INTRODUCTION

This telecourse reference guide addresses important case decisions and statutory law changes implemented during the legislative year. The program is intentionally designed to facilitate use during roll call training briefings and is designed to be used in conjunction with the DVD video training course. Materials are arranged to follow along the program sequence. Blank space has been provided to write notes, record information not included in the text, or to jot down questions.

CHANGES IN

GENERAL LAW ENFORCEMENT

LAWS

CRIME: COMMUNICATION DEVICE

Penal Code Sections 591.5
Chapter 695 / Assembly Bill 44

SUMMARY: It is unlawful to damage or obstruct the use of a cellular phone or other wireless communication device to prevent someone from using the device to summon aid or report a crime.

HIGHLIGHTS:

- Existing law provides that any person who unlawfully and maliciously damages any wireless communication device with the intent to prevent the use of the device to summon assistance or to notify law enforcement of a crime is punishable by a fine not exceeding $500, by imprisonment in a county jail for a period not exceeding one year, or by both that fine and imprisonment.

- This law would provide that these provisions are also violated when one obstructs the use of that equipment, and that this crime is punishable as a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is a misdemeanor to interfere with someone who is attempting to summon aid or report a crime with a wireless communication device.

NOTES:

CRIME: BANK PHOTOS OR VIDEO

Government Code Section 7480
Chapter 705 / Assembly Bill 618

SUMMARY: Financial institutions must now surrender surveillance photos or video recordings related to victim fraud without a search warrant.

HIGHLIGHTS:

- Existing law provides that when any police or sheriff's department, or district attorney in this state certifies to a bank, credit union, or savings association in this state, or doing business in this state, that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, or other orders, and so requests, the institution must furnish specified information, with the consent of the accountholder in the case of an institution doing business in the state, including account statements and a copy of the signature card.

- This law would provide that a law enforcement agency may also request, and a bank, credit union, or savings association must then provide, surveillance photographs and video recordings of a person accessing the crime victim's financial account via an ATM or from within the financial institution, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Victims of fraud may give law enforcement permission to retrieve photos or video recording from banks, credit unions, or savings associations.

NOTES:

CRIME: AUDIO RECORDINGS

Penal Code Section 653w
Chapter 9 / Assembly Bill 64

SUMMARY: This law reduces the number of pirated audio recordings from 1000 to 100 in order to charge a felony.

HIGHLIGHTS:

- Existing law provides that a person is guilty of failure to disclose the origin of a recording or audiovisual work if, for commercial advantage or private financial gain, he or she advertises, sells, rents, manufactures, or possesses for those purposes, a recording or audiovisual work that does not disclose the name of the manufacturer, author, artist, performer, or producer, as specified.

- Failure to disclose the origin of a recording or audiovisual work is punishable by imprisonment in a county jail, imprisonment in the state prison, and fine, or by both imprisonment and fine, as specified, depending on the number of articles of audio recordings or audiovisual works involved, and whether the offense is a first offense, or 2nd subsequent offense.

- This law would reduce the required number of audio recordings involved necessary to prosecute this offense as a felony.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Possession of 100 pirated audio or audiovisual recordings is sufficient to charge someone with a felony.

NOTES:

CRIME: IDENTIFICATION AND MAIL THEFT

Penal Code Section 530.5 & 530.55 (Added)
Chapter 522 / Assembly Bill 2886

SUMMARY: It is now a wobbler to commit identity theft with a prior or to possess personal information of ten or more people to commit identity theft. Theft of mail is now a misdemeanor.

HIGHLIGHTS:

- Existing law provides that every person who, with the intent to defraud, acquires, transfers, or retains possession of the personal identifying information of another person is guilty of a crime punishable by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment.

- This law would instead provide that every person who, with the intent to defraud, acquires or retains possession of the personal identifying information of another person, and who has previously been convicted of a violation of provisions proscribing identity theft, or who, with the intent to defraud, acquires or retains possession of the personal identifying information of 10 or more other persons, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

- This law would also provide that any person who, with intent to defraud, sells, transfers, or conveys the personal identifying information of another person shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison.

- This law would also provide that any person who, with actual knowledge that the personal identifying information of a specific person will be used in violation of identity theft provisions who sells, transfers, or conveys that personal identifying information shall be punished by a fine or by both a fine and imprisonment, or by imprisonment in the state prison.

- This law would specify that, for purposes of these provisions, “person” includes natural persons living and deceased, and organizations, associations, business relationships and other legal entities, expand the definition of “personal identifying information” to include any form of identification equivalent to those already listed, and make other conforming changes.

- Existing federal law provides that mail theft is punishable by a fine, imprisonment for a period not exceeding 5 years, or by both.

- This law would provide that mail theft, as defined, is punishable by a fine, imprisonment in a county jail for a period not exceeding one year, or by both a fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is a new misdemeanor to steal someone’s mail and identity theft with a prior or possession of the personal identity of ten or more people with the intent to commit identity theft is a wobbler.

NOTES:

VICTIMS OF CRIME: INFORMATION CARD

Penal Code Section 679.08 (Added)
Chapter 94 / Assembly Bill 2705

SUMMARY: Law enforcement may provide a victim a victim's rights card.

HIGHLIGHTS:

- Existing law provides for the rights of victims of crime, as specified.
- This law would provide that whenever there has been a crime committed against a victim, the law enforcement officer assigned to the case may provide the victim of the crime with a "Victim's Rights Card," as specified.
- The law would provide that its provisions shall be operative in a city or county only upon the adoption of a resolution by the city council or board of supervisors to that effect and that any act or omission covered by this section is a discretionary act, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Under resolution adopted by a city council or board of supervisors, law enforcement may develop and distribute victim's rights cards.

NOTES:

PROTECTIVE ORDERS: EMERGENCY

Family Code Section 6275 (Added)
Chapter 479 / Assembly Bill 2139

SUMMARY: This law would require a law enforcement officer to inform a person that an emergency protective order may be requested when the officer believes there are reasonable grounds to request one. The officer would then be required to request an emergency protective order.

HIGHLIGHTS:

- Existing law authorizes a law enforcement officer to seek an emergency protective order when the officer asserts reasonable grounds to believe that a person is in immediate and present danger of domestic violence, that a child is in immediate and present danger of abuse by a family or household member, that a child is in immediate and present danger of being abducted by a parent or relative, that an elder or dependent adult is in immediate and present danger of abuse, or that a person is in immediate and present danger of stalking as specified. An emergency protective order expires at the earlier of the 5th court day or 7th calendar day following the date of issuance.

- This law would require a law enforcement officer who responds to a situation in which the officer believes that there may be grounds for the issuance of an emergency protective order, to inform the person for whom the order may be sought or, if the person is a minor, his or her parent or guardian, as specified, that he or she may request the officer to request an emergency protective order.

- The law would require an officer to request an emergency protective order if the officer believes that the person requesting an emergency protective order is in immediate and present danger.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: When officers have reasonable grounds to believe an emergency protective order may be requested they must now inform the person and seek the order if requested.

NOTES:

PROTECTIVE ORDERS: EMERGENCY

Family Code Sections 6250.3 (Added)
Chapter 82 / Assembly Bill 1787

SUMMARY: This law requires that each and every emergency protective order be approved by a judicial officer.

HIGHLIGHTS:

- Existing law authorizes the courts to issue emergency protective orders protecting victims from domestic violence.
- Existing law provides the procedure for the issuance and service of the protective order.
- This law would provide that an emergency protective order is valid only if it is issued by a judicial officer after making specified findings and pursuant to a specific request by a law enforcement officer.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Standing orders for blanket approval of emergency protective orders are not valid. Each order has to be approved on it's own merit by a judicial officer.

NOTES:

CRIME: ANIMAL ABUSE

Penal Code Section 597.7 (Added)
Chapter 431 / Senate Bill 1806

SUMMARY: This law makes it unlawful to leave an animal in an unattended vehicle under conditions that are likely to cause suffering, disability, or death.

HIGHLIGHTS:

- Existing law provides that any person who subjects any animal to needless suffering, or inflicts unnecessary cruelty upon an animal, or in any manner abuses any animal or fails to provide an animal with proper food, drink, or shelter or protection from the weather is guilty of a crime punishable by a fine not exceeding $20,000, imprisonment in a county jail, imprisonment in the state prison, or both fine and imprisonment.

- This law would state findings and declarations regarding the consequences of leaving companion animals unattended inside closed vehicles in the heat.

- This law would provide that leaving or confining an animal in any unattended motor vehicle under conditions that endanger the health or well-being of an animal due to heat, cold, lack of adequate ventilation, or lack of food or water, or other circumstances that could reasonably be expected to cause suffering, disability, or death to the animal is a crime punishable by a fine, imprisonment in a county jail, or both fine and imprisonment, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers may forcibly enter an unattended vehicle to evacuate an animal in need of care.

NOTES:

CRIME: DOG TETHERING

Health and Safety Code Section 122335 (Added)
Chapter 489 / Senate Bill 1578

SUMMARY: This law makes it unlawful to tether a dog to a stationary object for more than three hours in a twenty-four hour period.

HIGHLIGHTS:

- Existing law contains various provisions relating to the health, safety, and humane treatment of animals, such as birds, horses and other equines, and animals performing in traveling circuses and carnivals.
- This law, with specified exceptions, would prohibit a person from tethering, fastening, chaining, tying, or restraining a dog to a dog house, tree, fence, or other stationary object.
- This law would make a violation of its provisions an infraction or a misdemeanor.
- This law would also permit animal control, as defined, to issue a correction warning in lieu of an infraction or misdemeanor, as specified.
- This law would provide that it is not to be construed to prevent a person from walking a dog with a hand-held leash.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now an infraction/misdemeanor to tie a dog to any stationary object, other than a pulley or trolley system, for more than three hours in twenty-four hours.

NOTES:

CRIME: ANIMAL FIGHTING

Penal Code Section 597b, 597j & 597c (Repealed & Added)
Chapter 430 / Senate Bill 1349

SUMMARY: This law makes a second conviction for animal fighting a wobbler and creates 597c a seperate misdemeanor for attending an animal fighting exhibition.

HIGHLIGHTS:

- Existing law generally prohibits persons from causing or permitting specified animals to engage in fighting, and prohibits owning or training specified animals for those purposes.
- Existing law provides that these offenses are misdemeanors with various penalties, and that subsequent violations of these provisions are misdemeanors with additional specified penalties.
- This law would increase the penalties for the misdemeanors and would provide that subsequent violations of these provisions shall be misdemeanors or felonies with prescribed penalties.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: People present at animal fighting exhibitions, or a place where an exhibition is about to be held, excluding dog fights, are in violation of a misdemeanor.

NOTES:

PRECURSORS: PHENCYCLIDINE AND METHAMPHETAMINE

Health and Safety Code Sections 11383, 11383.5 (Added), 11383.6 (Added) & 11383.7 (Added)
Chapter 646 / Senate Bill 1299

SUMMARY: This law makes it unlawful to posses specified precursors used in the manufacture of phencyclidine or methamphetamine with the intent to sell, transfer or furnish them to a manufacturer.

HIGHLIGHTS:

- Existing law generally makes it a felony punishable by 2, 4, or 6 years in the state prison for a person to possess specified substances at the same time with the intent to manufacture phencyclidine or methamphetamine.
- This law would reorganize these provisions.
- This law would also make it a felony, punishable by 16 months, 2, or 3 years in state prison, for any person to posses specified chemicals with the intent to sell, transfer, or otherwise furnish those chemicals to another knowing that they will be used to manufacture phencyclidine or methamphetamine.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Having PCP or methamphetamine precursors stockpiled with the intent to be used for manufacture is now a felony.

NOTES:

ALCOHOL: VAPORIZED DEVICE

Business and Professions Code Section 22621 (Added)
Chapter 29 / Assembly Bill 273

SUMMARY: This law makes Alcohol vaporized devices unlawful to sell or possess.

HIGHLIGHTS:

- The Alcoholic Beverage Control Act contains various provisions regulating the application for, the issuance of, the suspension of, and the conditions imposed upon, alcoholic beverage licenses by the Department of Alcoholic Beverage Control.
- This law would prohibit the sale, purchase, and use of any vaporized form of alcohol produced by an alcohol vaporizing device, as defined.
- This law would also provide that a person who purchases or uses any vaporized form of alcohol produced by an alcohol vaporizing device is subject to a fine of $250.
- This law would also provide that a person who sells or offers for sale any vaporized form of alcohol, or who possesses, sells, or offers for sale any alcohol vaporizing device, is guilty of a misdemeanor and is subject to imprisonment in a county jail, or a fine of not more than $1,000, or both.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Alcohol vaporized devises are now unlawful in California.

NOTES:

LAW ENFORCEMENT: SUPPLEMENTAL SERVICES

Government Code Section 53069.8
Chapter 87 / Assembly Bill 2164

SUMMARY: This law permits Level I reserve peace officers to provide supplemental law enforcement services for private functions when a regular officer is not available.

HIGHLIGHTS:

- Existing law authorizes the county board of supervisors on behalf of the sheriff, and the legislative body of any city on behalf of the chief of police, to contract to provide supplemental law enforcement services to private individuals, private entities, and private corporations in specified circumstances and subject to certain conditions. Among those conditions are that the contract services provided shall be rendered by regularly appointed full-time peace officers, as defined.
- This law would additionally provide that services provided in connection with special events or occurrences, as specified, may be rendered by Level I reserve peace officers, as defined, who are authorized to exercise the powers of a peace officer, if there are no regularly appointed full-time peace officers available to fill the positions as required by the contract.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Level I reserve officers may work private functions when a regular officer is not available.

NOTES:

DEPUTY SHERIFFS: STATE CITIZENSHIP

Government Code Section 24103 (Repealed)
Chapter 53 / Senate Bill 1241

SUMMARY: The law that required deputy sheriffs and marshals to live in California has been repealed.

HIGHLIGHTS:

- Existing law establishes various requirements for eligibility to be a deputy sheriff or deputy marshal. One requirement is that a person shall not be appointed deputy sheriff or deputy marshal unless he or she is a citizen of this state.
- This law would repeal that requirement.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Deputy sheriffs and marshals may work in California and live in another state.

NOTES:

ARRESTS: CARETAKER PARENTS

Penal Code Sections 833.2 (Added) & 13517.7 (Added)
Chapter 729 / Assembly Bill 1942

SUMMARY: This law requires P.O.S.T. to develop a child care training program for law enforcement. It also encourages law enforcement to develop protocols pertaining to child safety when a caretaker parent is arrested.

HIGHLIGHTS:

- Existing law generally regulates the conditions of arrest.
- This law would express the intent of the Legislature regarding the development of protocols by law enforcement and other entities, pertaining to arresting caretaker parents or guardians of minors, to ensure the safety and well-being of the minor.
- The bill would also state that the Legislature encourages the Department of Justice to apply for a federal grant to train local law enforcement agencies and assist them in developing protocols pertaining to child safety when a caretaker parent or guardian is arrested.
- Existing law establishes the Commission on Peace Officer Standards and Training and charges it with various responsibilities.
- This law would require the commission to develop guidelines and training for use by state and local law enforcement officers to address issues related to child safety when a caretaker parent or guardian is arrested, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement will be receiving training related to child care safety when caretaker parents are arrested and agencies are encouraged to develop procedures that will ensure that dependent children are cared for when their caretaker is arrested.

NOTES:

CHILD ABUSE: REPORTING REQUIREMENTS

Penal Code Sections 11162.5, 11165.9, 11166, 11167, 11167.5 and 11170
Chapter 701 / Assembly Bill 525

SUMMARY: This law adds "emotional damage" to the procedures for the mandatory reporting and handling of child abuse and neglect. It authorizes but does not require a mandated reporter to report emotional abuse.

HIGHLIGHTS:

- Existing law defines the term "child abuse or neglect" for purposes of mandatory reporting of suspected instances of child abuse or neglect.
- Existing law specifies certain agencies to which mandated reports of suspected child abuse or neglect shall be made.
- Existing law requires those agencies to forward those reports that are determined not to be unfounded to the Department of Justice.
- Existing law also authorizes, but does not require, the reporting of instances where a child suffers or is at substantial risk of suffering serious emotional damage, as specified.
- This law would generally conform the procedures for authorized reporting of instances of child abuse or neglect involving emotional damage, as specified, to certain existing procedures applicable to mandated child abuse reporting.
- Existing law requires a representative of a child protective services agency performing an investigation resulting from a required report of suspected child abuse or neglect to inform the individual who is the subject of the investigation, at the 1st contact, of the complaints or allegations against that person, as specified.
- This law would apply that requirement in the context of reports of child abuse or neglect involving serious emotional damage that are authorized to be reported.
- Existing law requires the investigating agency investigating suspected child abuse or neglect, upon completion of the investigation or after there has been a final disposition of the matter, to inform the mandated reporter of the results of the investigation and of any action the agency is taking with regard to the child or family.
- This law would apply that requirement to the context of reports of child abuse or neglect involving serious emotional damage that are authorized to be reported.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Mandated reporters may report emotional abuse but are not required to do so. When it is reported emotional abuse reports must be forwarded to DOJ.

NOTES:

CRIME: HAZING

Penal Code Section 245.6 (Added)
Education Code Sections 32050 & 32051 (Repealed)
Chapter 601 / Senate Bill 1454

SUMMARY: This law makes hazing resulting in bodily injury or death a violation of the penal code, charged as a wobbler depending on the severity of the injury. This law applies to any school organization, not just college.

HIGHLIGHTS:

- Existing law codifies within the Education Code the definition of hazing and imposes criminal penalties on persons who haze.
- This law would repeal the Education Code hazing provisions and instead codify within the Penal Code a new definition of hazing and prescribe misdemeanor and felony penalties, as specified.
- This law would also allow a person to bring a civil action for injury or damages against individuals who participate in the hazing or organizations who authorize, request, command, participate in, or ratify the hazing.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Hazing resulting in death or serious injury has been moved from the education to the penal code.

NOTES:

SEX OFFENDERS: WORKING WITH MINORS

Penal Code Section 290.95
Chapter 341 / Assembly Bill 2263

SUMMARY: This law makes it a misdemeanor for registered sex offenders to work with children in an accompanied setting without disclosing their registration status.

HIGHLIGHTS:

- Under existing law, a person who is required to register as a sex offender who applies or accepts a position as an employee or volunteer with any person, group, or organization where he or she would be working directly and in an unaccompanied setting with minor children on a regular basis, is required to disclose his or her registrant status. A violation of that provision is a misdemeanor.

- This law would require every person required to register as a sex offender who applies for or accepts a position as an employee or volunteer with any person, group, or organization where the applicant would be working directly and in an accompanied setting with minor children, and the applicant's work would require him or her to touch the minor children on more than an incidental and occasional basis, to disclose his or her status as a registrant, upon application or acceptance of the position, to that person, group, or organization.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Registered sex offenders may not work with children at all without disclosing their registration status.

NOTES:

SEX OFFENSES: VICTIM INFORMATION

Penal Code Section 293
Chapter 92 / Assembly Bill 2615

SUMMARY: This law allows county probation officers to the list of law enforcement officials who may obtain the name and address of a victim of a sex offense for the purpose of conducting official business.

HIGHLIGHTS:

- Current law provides that the victim of a sex offense may request that his or her name and address not be a matter of public record.
- Current law further provides that the name of a person who is the victim of a sex offense may be disclosed to certain law enforcement officials for the purpose of conducting official business even if the victim requested to keep his or her name and address confidential.
- This law would add county probation officers to the list of law enforcement officials who may obtain the name and address of a victim of a sex offense for the purpose of conducting official business as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: County probation officers may obtain sex offense victim information while conducting official business.

NOTES:

SEX OFFENDERS: ELECTRONIC MONITORING

Penal Code Sections 290.04 (Added), 290.05 (Added), 290.06 (Added), 1202.8 & 3004
Chapter 336 / Senate Bill 1178

SUMMARY: This law would require every adult male who is convicted of an offense that requires him to register as a sex offender who is assessed to have a high risk of reoffending to be continuously electronically monitored while on probation or parole, unless the Department of Corrections and Rehabilitation determines that such monitoring is unnecessary for a particular person.

HIGHLIGHTS:

- Existing law requires a person convicted of any specified sex offense to register as a sex offender.
- This law would require every person required to register as a sex offender to be subject to assessment using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO).
- The law would establish the SARATSO Review Committee, as specified. Commencing January 1, 2008, the SARATSO for adult males would be the STATIC-99 risk assessment scale. The committee could be required to research risk assessment tools for female and juvenile offenders, and to advise the Legislature and Governor of their recommendation. The committee would also develop and administer a training program for persons designated to administer the SARATSO to offenders.
- The law would require the Department of Corrections and Rehabilitation to assess every eligible person who is incarcerated or on parole for the risk of reoffending, using the SARATSO.
- The law would also require each probation department to assess every eligible person who is under their supervision for the risk of reoffending, using the SARATSO.
- Existing law requires persons placed on probation by a court to be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation.
- This law would require every adult male who is convicted of an offense that requires him to register as a sex offender who is assessed to have a high risk of reoffending to be continuously electronically monitored while on probation, unless the court determines that such monitoring is unnecessary for a particular person.
- The law would require each probation department to report to the Legislature and to the Governor on the effectiveness of mandatory electronic monitoring of offenders, as specified.

- Existing law authorizes the parole authority to require, as a condition of release on parole or reinstatement on parole, or as an intermediate sanction in lieu of return to prison, that an inmate or parolee agree in writing to the use of electronic monitoring or supervising devices.

- This law would require every adult male who is convicted of an offense that requires him to register as a sex offender who is assessed to have a high risk of reoffending to be continuously electronically monitored while on parole, unless the Department of Corrections and Rehabilitation determines that such monitoring is unnecessary for a particular person.

- The law would require the Department of Corrections and Rehabilitation to report to the Legislature and to the Governor on the effectiveness of mandatory electronic monitoring of offenders, as specified.

- The law would specify that the monitoring device used for these purposes shall be identified as one that employs the latest available proven effective monitoring technology.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers need to be aware that high risk sex offenders are now continuously electronically monitored.

NOTES:

CRIME: SPOUSAL RAPE

Penal Code Section 262
Chapter 45 / Senate Bill 1402

SUMMARY: This law would remove provisions requiring that an allegation of spousal rape has been reported previously or corroborated by independent evidence in order to be prosecuted.

HIGHLIGHTS:

- Existing law defines spousal rape as an act of sexual intercourse accomplished by means of force or violence, when the victim is at the time unconscious, or by threats of retaliation or use of public authority against the victim.
- Existing law provides, however, that no prosecution will be commenced under these provisions unless the violation was reported to other specified persons within one year of the violation, unless the allegation is corroborated by independent evidence, as specified.
- This law would remove provisions requiring that an allegation of spousal rape has been reported previously or corroborated by independent evidence in order to be prosecuted.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Spousal rape provisions have been removed from the penal code.

NOTES:

SEX OFFENDERS: COMMUNICATION WITH VICTIMS

Penal Code Section 3053.6 (Added)
Chapter 753 / Assembly Bill 2049

SUMMARY: This law would provide that any person who has been convicted of an offense that requires him or her to register as a sex offender from contacting or communicating with the victim, or victims or any of their immediate family members, when determined to be appropriate by the Department of Corrections.

HIGHLIGHTS:

- Existing law generally regulates the parole of sex offenders and the terms and conditions of parole that may be placed on those offenders upon release from prison.
- This law would provide that any person who has been convicted of an offense that requires him or her to register as a sex offender would, as determined to be appropriate by the Department of Corrections and Rehabilitation, as a term of parole be prohibited from contacting or communicating with the victim, or victims or any of their immediate family members.
- The law would also provide that the district attorney of the prosecuting county may be available for assisting the victim in a determination of the appropriateness of imposing that condition of parole, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Registered sex offenders may be prohibited from communicating with their victim or victim's family members.

NOTES:

SEX OFFENDERS: PUNISHMENT, CONTROL & CONTAINMENT ACT

Government Code Section 68152, Penal Code Sections 209, 220, 269, 288.5, 290, 290.3, 290.46, 311.2, 311.4, 311.9, 311.11, 626.8, 647.6, 667.1, 667.5, 667.51, 667.6, 667.61, 667.71, 1170.125, 1192.7, 1203, 1203c, 1203.06, 1203.065, 1203.075, 3000, 3001, 3005, 12022.75, 13887, and 13887.1, 653g (Amended and Renumbered) 288.3, 288.7, 290.03, 290.04, 290.05, 290.06, 290.07, 290.08, 626.81, 653c, 801.2, 1203e, 1203f, 3072, and 13887.5 (Added), Welfare and Institutions Code Sections 6600, 6601, 6604, 6604.1, and 6605
Chapter 337 / Senate Bill 1128

SUMMARY: This ACT changes fifty-four different statutes. The most significant of those changes are aggravated sexual assault is changed to include a victim under 14 years old and at least 7 years younger than the suspect. 288.3 is added to the penal code which makes it a misdemeanor for someone to arrange a meeting with a minor or someone believed to be a minor if the meeting is to sexually expose themselves or the minor, or to commit a lewd or lascivious act. If they're a registered sex offender or if they actually show up for the meeting at about the right time they're guilty of a felony. If a suspect engages in some conduct with an adult that they thought was a child they can still be charged with 647.6. And, sex with a child 10 years of age or younger, 288.7, carries a sentence of 15 years to life for oral copulation or penetration with a foreign object and 25 years to life for sodomy or intercourse. 626.81 makes it illegal for any registered sex offender to set foot on a school ground without lawful business and written permission. 653c PC makes it illegal for a registered sex offender convicted of committing an offense against an elder or dependent adult can't enter a day care or residential elder facility without permission.

HIGHLIGHTS:

- Existing law sets forth timelines for the retention of court records, depending upon the subject matter or criminal offense. Records relating to felonies are required to be kept for 75 years.
- This law would require courts to keep all records relating to misdemeanor actions resulting in a requirement that the defendant register as a sex offender for 75 years.
- The law also would require every district attorney's office and the Department of Justice to retain records relating to a registered sex offender for 75 years after disposition of the case.
- Under existing law, the punishment for kidnapping with the intent to commit any of several specified sexual acts is imprisonment in the state prison for life with the possibility of parole.

- This law would add rape committed in concert and committing lewd and lascivious acts to the above specified sexual acts.

- Under existing law, the punishment for assault with intent to commit any of several specified sexual acts is imprisonment in the state prison for 2, 4, or 6 years.

- This law would provide that the punishment for assaulting another person with the intent to commit any of several specified sexual acts while in the commission of a first degree burglary is imprisonment in the state prison for life with the possibility of parole.

- Under existing law, a person who commits any of several sexual acts upon a child who is under 14 years of age and 10 or more years younger than the person, is guilty of aggravated sexual assault of a child.

- This law would change the age elements of the crime to 14 years of age and 7 or more years younger than the perpetrator, and would expand the types of sex offenses to which it would apply.

- The law would require the court to impose a consecutive sentence for each offense that results in a conviction under this provision.

- This law would create new offenses for persons who arrange a meeting with a minor or person he or she believes to be a minor for the purpose of exposing his or her genitals or pubic or rectal area, having the child expose any of these areas, or engaging in lewd or lascivious behavior; and for persons who actually go to that arranged meeting.

- Under existing law, continuous sexual abuse of a child is a felony punishable by imprisonment in the state prison for 6, 12, or 16 years.

- Existing law prohibits any other felony sex offense involving the same victim from being charged in the same proceeding, except as specified.

- This law would change that provision to prohibit any other act of substantial sexual conduct with a child under 14 years of age, or lewd and lascivious acts, involving the same victim, from being charged in the same proceeding, except as specified.

- Under existing law, the punishment for annoying or molesting a child is a maximum fine of $1,000 and imprisonment in the county jail.

- This law would increase the maximum fine to $5,000 and would create a new crime for persons who, motivated by an unnatural or abnormal sexual interest in children, engages in conduct with an adult whom he or she believes to be a child, which conduct, if directed toward a child, would be a violation of the above provision.

- Under existing law, lewd or lascivious conduct with a minor is a felony.

- Under existing law, any person who engages in unlawful sexual intercourse with a minor who is more than 3 years younger than the perpetrator is guilty of either a misdemeanor or felony, and may also be liable for civil penalties.

- The law would provide that any adult who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state

prison for 25 years to life, and that any adult who engages in oral copulation or sexual penetration with a child who is 10 years of age or younger is guilty of a felony punishable by imprisonment in the state prison for 15 years to life.

- Existing law requires a person convicted of any specified sex offense to register as a sex offender.

- This law would add the above new crimes to the list of crimes that require a person to register as a sex offender, and would also add murder in the perpetuation of or attempt to commit certain sex crimes to the list, and would add conspiracy to commit any of the offenses to the list.

- The law would make findings and declarations regarding the need for a comprehensive system of risk assessment, supervision, monitoring, and containment for registered sex offenders.

- The law would require every person required to register as a sex offender to be subject to assessment using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO).

- The law would establish the SARATSO Review Committee, the purpose of which is to ensure that the SARATSO reflects the most reliable, objective, and well-established protocols for predicting sex offender risk of recidivism. Commencing January 1, 2007, the SARATSO for adult males would be the STATIC-99 risk assessment scale. The committee would be required to research risk assessment tools for female and juvenile offenders, and to advise the Legislature and Governor of their recommendation. The committee would also periodically evaluate the SARATSO for each population and make any recommendations for changes, and develop and administer a training program for officers who would administer the SARATSO. Persons who administer the SARATSO would be required to be trained at least every 2 years.

- The law would require the Department of Corrections and Rehabilitation to assess every eligible person who is incarcerated or on parole, using the SARATSO.

- The law would also require each probation department to assess every eligible person who is under their supervision.

- This law would authorize the Department of Corrections and Rehabilitation, subject to an appropriation, to establish and operate a specialized sex offender treatment pilot program for inmates whom the department determines pose a high risk to the public of committing violent sex crimes.

- Under existing law, the court is required to impose a fine of $200 for the first conviction of a person who is convicted of a sex offense for which registration as a sex offender is required, and $300 for a subsequent conviction.

- This law would increase those fines to $300 and $500, respectively, and would allocate $100 from each fine to the Governor's Office of Emergency Services to fund SAFE teams.

- Existing law requires the Department of Justice to make available to the public information regarding registered sex offenders via an Internet Web site.

- This law would modify the information to be made available to the public, and would require the Attorney General to develop strategies to assist members of the public in understanding how to use the information on the Web site to further public safety.

- The law would require the Department of Justice to renovate the Violent Crime Information Network, as specified.

- Under existing law, a person who possesses, prepares, publishes, produces, develops, duplicates, or prints any data or image with the intent to distribute, exhibit, or exchange the data or image with a person 18 years of age or older, knowing the data or image depicts a person under 18 years of age personally engaging in or personally simulating sexual conduct is guilty of a misdemeanor.
- This law would increase the punishment for that crime to a misdemeanor or felony.

- Under existing law, a person who uses a minor to assist in the production or distribution of child pornography is guilty of a misdemeanor upon a first offense.

- This law would increase the punishment for the first conviction of that crime to a misdemeanor or felony.

- Under existing law, the first conviction for possession of child pornography is punished as a misdemeanor.

- This law would make the punishment for a conviction either a misdemeanor or a felony and would provide for additional punishment for a person previously convicted of certain crimes.

- Under existing law, it is a misdemeanor for any person without any lawful business thereon, including any specified sex offender, to remain on school grounds, or to reenter school grounds, or any public way adjacent thereto, after being asked to leave, as specified.

- This law would increase the penalties for a violation of that crime if the person is a registered sex offender, and would make related changes.

- This law also would make it a misdemeanor for a person who is required to register as a sex offender where the victim w as an elderly or dependent person to enter or remain on the grounds of a day care facility where elderly or dependent persons reside or regularly are present, without lawful business thereon or written permission from the facility administrator.

- Existing law, added by initiative acts that require amendments to its provisions to be approved by 2⁄3 of the membership of both houses of the Legislature, defines “violent felony” for purposes of various provisions of the Penal Code.

- This law would include in that definition various sex offenses committed against a child who is under 14 years of age and more than 10 years younger than the perpetrator, or committed in concert.

- Existing law provides for an enhanced prison term of 5 years for a person convicted of committing any of several specified sex offenses who had a prior conviction for any of several other specified sex offenses. The enhanced term for a person with 2 or more previous convictions of any of those sex offenses is 10 years. The enhanced term does not apply if that person has not been in custody for, or committed a felony during, at least 10 years between the instant and prior offense.

- Existing law requires the person to receive credits for time served or for work, to reduce his or her sentence.

- This law would expand the types of sex crimes to which these provisions apply, delete the 10-year exception, and would eliminate the possibility of the person receiving credit to reduce his or her sentence.

- Under existing law, persons who are convicted of committing certain sex offenses who have previously been convicted of other sex offenses, including habitual sexual offenders, as defined, or who are convicted of certain sex offenses during the commission of another offense, are eligible for credit to reduce the minimum term imposed.
- This law would eliminate that eligibility for those persons.

- Under existing law, the punishment for a conviction of certain sex offenses is 25 years to life if the offense was committed in the course of a kidnapping or burglary, the victim was tortured, or the defendant had previously been convicted of one of these sex crimes.

- This law would add continuous sexual abuse of a child to those sex offenses.

- Under existing law, a court is prohibited from granting probation to, or suspending the execution or imposition of sentence for, any person who, with the intent to inflict the injury, personally inflicts great bodily injury on another person during the commission of any of several crimes.

- This law would eliminate the intent requirement of that provision.

- Under existing law, prosecution for an offense punishable by imprisonment in the state prison for 8 years or more is required to be commenced within 6 years after the commission of the offense.

- This law would extend the statute of limitations for prosecuting possession of child pornography for commercial purposes and for using a minor in the production of a representation of sexual conduct to 10 years from the date of production.

- Existing law, added by an initiative statute which provides for amendment of its provision by 2⁄3 vote of the Legislature, prohibits plea bargaining in certain felony cases, except as specified.

- This law would state the intent of the Legislature that district attorneys prosecute violent sex crimes under statutes that provide sentencing under “one strike,” “3 strikes” or habitual sexual offender laws instead of engaging in plea bargaining, and would require a district attorney to state on the record why a sentence should not be prosecuted under those provisions, if he or she engages in plea bargaining despite the stated intent.

- Existing law establishes a county probation system.

- This law would require probation officers trained in the use of the SARATSO to perform a presentencing risk assessment of every person convicted of an offense that requires him or her to register as a sex offender.

- The law would require each probation department to compile a Facts of Offense Sheet for those offenders, as specified.

- The law would require each county to designate certain probation officers to be trained to administer the SARATSO.

- The law would require those probationers who are deemed to be a high risk to the public, as determined by the SARATSO, to be placed on intensive and specialized probation supervision.

- Existing law requires a probation officer to prepare a report for the court for each person convicted of a felony.

- This law would require a probation officer to also use the SARATSO on each person convicted of a felony that requires him or her to register as a sex offender, in order to determine the person's risk of reoffending, and to include that assessment in the presentencing report.

- The law would require the results of that assessment to be considered by the court in determining suitability for probation.

- Existing law provides for a 3-year maximum period of parole for persons who are convicted of a felony, except that the maximum period of parole for persons who are convicted of certain violent felonies is 5 years.

- This law would set the maximum period of parole for persons who are convicted of certain sex offenses at 10 years.

- Under existing law relating to sexually violent predators, parole tolls from evaluation through the period of commitment, if any.

- This law would provide that parole tolls through any period of commitment and conditional release under court monitoring.

- Existing law requires the Department of Corrections and Rehabilitation to ensure that all parolees under active supervision and deemed to pose a high risk to the public of committing a violent sex crime are placed on an intensive and specialized parole supervision caseload.

- This law would instead require those parolees who are deemed to pose a high risk to the public of committing any sex crime, as determined by the SARATSO, to be placed on intensive and specialized supervision, and to be required to report frequently to designated parole officers.

- The law would authorize the department to place any other parolee on intensive and specialized supervision, as specified.

- Existing law provides for an enhanced penalty of 3 years for any person who administers a controlled substance to another person against his or her will, for the purpose of committing a felony.

- This law would create an additional enhancement of 5 years if that felony is any of several specified sex offenses.

- Existing law authorizes counties to establish sexual assault felony enforcement (SAFE) teams to reduce violent sexual assaults through proactive surveillance of habitual sexual offenders.

- This law would require the Office of Emergency Services to establish standards by which grants are awarded on a competitive basis to counties for SAFE teams.

- This law would appropriate $495,000 from the General Fund to the Office of Emergency Services, Division of Criminal Justice Programs for child abuse and abduction programs that provide prevention education to children in schools.

- Existing law defines "sexually violent offense" for purposes of the sexually violent predator law.
- This law would include prior convictions for certain offenses convicted as a juvenile or that resulted in an indeterminate sentence in that definition, and would otherwise expand that definition to include additional crimes.

- Under existing law, any finding made that a person is a sexually violent predator, as specified, shall not toll, discharge, or otherwise affect that person's period of parole, as specified.

- This law instead would provide that such a finding shall toll his or her period of parole.

- Under existing law, if a person is determined to be a sexually violent predator, he or she is committed to the State Department of Mental Health for 2 years for appropriate treatment and confinement. Confinement may not be extended except by court order.

- This law would change that commitment to an indeterminate term.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Aggravated sexual assault is changed to include a victim under 14 years old and at least 7 years younger than the suspect. 288.3 is added to the penal code which makes it a misdemeanor for someone to arrange a meeting with a minor or someone believed to be a minor if the meeting is to sexually expose themselves or the minor, or to commit a lewd or lascivious act. If they're a registered sex offender or if they actually show up for the meeting at about the right time they're guilty of a felony. If a suspect engages in some conduct with an adult that they thought was a child they can still be charged with 647.6. And, sex with a child 10 years of age or younger, 288.7, carries a sentence of 15 years to life for oral copulation or penetration with a foreign object and 25 years to life for sodomy or intercourse. 626.81 makes it illegal for any registered sex offender to set foot on a school ground without lawful business and written permission. 653c PC makes it illegal for a registered sex offender convicted of committing an offense against an elder or dependent adult can't enter a day care or residential elder facility without permission.

NOTES:

CRIME: FALSE REPORTS: EMERGENCY ALERT SYSTEM

Penal Code Section 148.3
Chapter 227 / Assembly Bill 2225

SUMMARY: This law adds any report that activates, or could activate, the emergency alert system to types of calls that constitute making a false emergency report.

HIGHLIGHTS:

- Existing law requires the activation of the Emergency Alert System if it has been reported to law enforcement that a child 17 years of age or younger or a person with a physical or mental disability has been abducted and it is determined that he or she is in imminent danger of serious bodily injury or death, as specified.

- Existing law also provides that any individual who reports an emergency that results or could result in the response of a public official of any city, county, or city and county, knowing that the report is false, is punishable by a fine not exceeding $1,000, imprisonment in a county jail, or by both that fine and imprisonment.

- This law would expand these provisions to include an emergency that results in or could result in activation of the Emergency Alert System with the exception of reports made in good faith by a parent, legal guardian, or lawful custodian of a child.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Activating the emergency alert system now qualifies as an emergency for false reporting purposes.

NOTES:

EMERGENCY SERVICES: LIABILITY

Government Code Section 53153.5 (Added)
Chapter 226 / Assembly Bill 2135

SUMMARY: This law would make an individual making a false report resulting in the activation of the emergency response system liable for the expense of any law enforcement emergency response.

HIGHLIGHTS:

- Existing law provides that any person who is under the influence of an alcoholic beverage, any drug, or the combination of an alcoholic beverage and any drug, whose negligent operation of a motor vehicle, a boat or vessel, or a civil aircraft caused by that influence proximately causes any incident resulting in an appropriate emergency response, and any person whose intentionally wrongful conduct proximately causes an incident resulting in an appropriate emergency response, is liable for the expense of an emergency response by a public agency to the incident.

- This law would provide that any person 18 years of age or older who is convicted of making a false police report, and that false police report proximately causes an appropriate emergency response by a public agency, is liable for the expense of the emergency response made by the responding public agency to the incident.

- The law would specify that a public agency shall be entitled to satisfaction for any judgment for expenses for an emergency response under specified conditions.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Law enforcement emergency response costs can be sought from individuals who make false reports involving the activation of the emergency response system.

NOTES:

CRIME: BRIBERY

Penal Code Sections 85, 86 & 88
Chapter 435 / Senate Bill 1308

SUMMARY: This law would add any member of the legislative body of a city, county, city and county, school district, or other special district to the bribery statutes.

HIGHLIGHTS:

- Existing law subjects a person who offers to give a bribe to a Member of the Legislature or a person on the member's behalf, or who attempts through specified corrupt means to influence the vote of a member, to imprisonment in the state prison.
- This law would, in addition, subject a person who offers to give a bribe to any member of the legislative body of a city, county, city and county, school district, or other special district, or a person on the member's behalf, or who attempts through specified means to influence the vote of any member of a legislative body of a city, county, city and county, school district, or other special district, to imprisonment in the state prison.
- Existing law subjects any Member of the Legislature who asks for or receives a bribe in exchange for influence over his or her official action to imprisonment in the state prison.
- This law would, in addition, subject any member of the legislative body of a city, county, city and county, school district, or other special district who asks for or receives a bribe in exchange for influence over his or her official action to imprisonment in the state prison.
- Existing law requires any Member of the Legislature convicted of a crime involving bribery to forfeit his or her office and disqualifies him or her from ever holding office again.
- This law would, in addition, require any member of the legislative body of a city, county, city and county, school district, or other special district who is convicted of a crime involving bribery to forfeit his or her office and would disqualify him or her from ever holding office again.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Members of the legislative body of a city, county, city and county, school district, or other special district may not accept or solicit a bribe.

NOTES:

GAMBLING: NONPROFIT ORGANIZATION FUNDRAISERS

Business and Professions Code Sections (Added) 19985, 19986 & 19987
Chapter 707 / Assembly Bill 839

SUMMARY: This law would limit nonprofit organizations that have been in existence for at least 3 years from holding more than one casino night fundraiser a year. It also limits prizes awarded to non-cash donated items not exceeding $500 and 90% of the revenue must go to the nonprofit organization.

HIGHLIGHTS:

- The Gambling Control Act provides for the licensure and regulation of various legalized gambling activities and establishments by the California Gambling Control Commission and the enforcement of those activities by the Division of Gambling Control within the Department of Justice. The act also requires all fees and revenues collected under the act to be deposited in the Gambling Control Fund, which funds are available, upon legislative appropriation, for the division and commission in carrying out their duties under the act.

- This law would revise that act to permit a nonprofit organization to conduct fundraisers using controlled games as a funding mechanism to further the purposes and mission of the nonprofit organization.

- The law would prohibit a nonprofit organization holding a fundraiser from conducting more than one fundraiser per calendar year, except as specified, and would require that each fundraiser be limited to no more than 5 consecutive hours.

- The law would also prohibit cash prizes or wagers from being awarded to participants, but would allow winners of controlled games to receive prizes from those donated, subject to certain cash value limitations.

- The law would also require at least 90% of revenue from fundraisers to go directly to the nonprofit organization and would prohibit more than 10% of the gross receipts of a fundraiser from being paid as compensation to the entity or persons conducting the fundraiser for the nonprofit organization, excluding facility rental fees, as specified.

- The law would define “nonprofit organization” to include various organizations qualified to conduct business in California for at least 3 years prior to conducting a controlled game that are exempt from taxation pursuant to specified provisions of the Revenue and Taxation Code.

- This law would further prohibit an eligible nonprofit organization from conducting a fundraiser using controlled games unless it has been in existence and operation for at least 3 years and registers annually with the Division of Gambling Control.

- The law would require the division to furnish registration forms to nonprofit organizations, as specified, collect certain information from nonprofit organizations conducting fundraisers, and adopt regulations in accordance with those provisions.

- The law would additionally permit the division to charge eligible organizations an annual registration fee to cover the costs of administration and enforcement and would specify that those fees be deposited into the Gambling Control Fund.

- The law would also authorize the division to require specified suppliers of equipment used in the playing of controlled games by a nonprofit organization, to register with the division.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Members of the legislative body of a city, county, city and county, school district, or other special district may not accept or solicit a bribe.

NOTES:

CRIME: PETTY THEFT

Penal Code Sections 19.8 & 490.7 (Added)
Chapter 228 / Assembly Bill 2612

SUMMARY: This law would make it an infraction to steal more than 25 copies of the current issue of a free newspaper.

HIGHLIGHTS:

- Existing law defines petty theft and provides that if the value of the money, labor, real or personal property taken is $50 or less, the crime may be punishable by a fine not exceeding $250, or by a fine not exceeding $1,000, imprisonment in a county jail for a period not exceeding 6 months, or both that fine and imprisonment.

- This law would provide that it is a crime to take more than 25 copies of the current issue, as defined, of a free or complimentary newspaper if done to recycle, barter, or to deprive others of the opportunity to read the newspaper, or to harm a business competitor, punishable by a fine not to exceed $250 for a 1st violation, and for a 2nd or subsequent violation by that fine or by a fine not exceeding $500, imprisonment of up to 10 days in a county jail, or by both fine and imprisonment.

- This law would provide exceptions to these provisions for owners, publishers, printers, deliverers, advertisers and others, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: It is now unlawful to steal more than 25 copies of free newspapers.

NOTES:

CRIME: CRIMINAL GANGS

Penal Code Section 186.22
Chapter 596 / Senate Bill 1222

SUMMARY: This law adds crimes relating to prohibited possession of a firearm, carrying a concealed firearm, and carrying a loaded firearm, to those offenses which if committed by members of the criminal street gang establish a pattern of criminal gang activity.

HIGHLIGHTS:

- Existing law, as amended by initiative, provides that any person who participates in any criminal street gang with knowledge that its members engage in a pattern of criminal gang activity and who promotes felonious criminal conduct shall be punished, as specified.

- Existing law defines a pattern of criminal gang activity as the commission, attempt to commit, conspiracy to commit, solicitation for, or conviction of 2 or more listed offenses, as specified. Existing law authorizes the Legislature to amend these provisions with a 2/3 vote of each house.

- This law would add various crimes relating to prohibited possession of a firearm, carrying a concealed firearm, and carrying a loaded firearm, to those offenses which if committed by members of the criminal street gang establish a pattern of criminal gang activity for purposes of these provisions, as specified.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: A pattern of criminal activity now includes possession of a firearm, carrying a concealed firearm, and carrying a loaded firearm.

NOTES:

CHANGES IN

FIREARMS

LAWS

FIREARMS: DISCHARING A FIREARM

Penal Code Section 246.3 (Amended)
Chapter 180 / Senate Bill 532

SUMMARY: This bill creates a new crime for the willful discharge of a BB device in a grossly negligent manner.

HIGHLIGHTS:

- Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner that could result in injury or death to a person is guilty of a public offense punishable by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

- This bill would expand the scope of that offense to include a BB device, as defined, and would make the offense involving a BB device punishable by imprisonment in a county jail, not exceeding one year.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill creates a new law for the crime of discharging a BB device in a grossly negligent manner which law enforcement will be required to uphold.

NOTES:

FIREARMS: PROTECTIVE ORDERS

Civil Code Section 527.9 (Amended)
Chapter 474 / Assembly Bill 2129

SUMMARY: This bill requires a person who has been served with a protective order to relinquish any firearm within 24 hours regardless of whether the person was present in court when the order was served.

HIGHLIGHTS:

- Existing law requires a person who is subject to a temporary restraining order or injunction that prohibits certain forms of harassment, violence, harm, intimidation, or abuse to relinquish a firearm. If the person is present in court at a duly noticed hearing, the court must order that person to relinquish the firearm, by either surrendering the firearm to the control of local law enforcement or selling the firearm to a licensed gun dealer, within 24 hours of the order. If the person is not present in court, the respondent is required to relinquish the firearm within 48 hours after being served with the order. The person must file a surrender receipt with the court within 72 hours after receipt of the order.

- The bill would instead require the person to surrender the firearm within 24 hours of being served with the order without regard to whether the person is present in court. This bill would also require the person to present a surrender receipt to the court within 48 hours after receipt of the order.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill clarifies the timeframe in which a person served with a protective order must surrender any firearm(s) to law enforcement. This clarity will assist law enforcement and the parties in understanding the clear terms of the order, and result in better safety and protection for those protected by these vital orders

NOTES:

FIREARMS: PROTECTIVE ORDERS

Family Code Section 6389 (Amended)
Chapter 467 / Senate Bill 585

SUMMARY: This bill requires a person who has been served with a protective order to relinquish any firearm within 24 hours regardless of whether the person was present in court when the order was served.

HIGHLIGHTS:

- Existing law prohibits a person subject to a protective order, as defined, from owning, possessing, purchasing, or receiving a firearm while that protective order is in effect and makes a willful and knowing violation of a protective order a crime.
- Existing law also requires the court, upon issuance of a protective order, to order the respondent to relinquish any firearm in that person's immediate possession or control, or subject to that person's immediate possession or control, within 24 hours of being served with the order, by either surrendering the firearm to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer.
- Under existing law, a person ordered to relinquish any firearm is required to file with the court a receipt showing the firearm was surrendered or sold within 72 hours after receiving the order.
- This law would instead require the person ordered to relinquish a firearm to immediately surrender the firearm in a safe manner, upon request of any law enforcement officer, or within 24 hours as specified above.
- The law also would require the person to file a receipt with the court within 48 hours after being served with the order and would provide that the failure to timely file a receipt constitutes a violation of the protective order.
- The law would also require application forms for protective orders adopted by the Judicial Council and approved by the Department of Justice to be amended to require the petitioner to describe the number, types, and locations of any firearms presently known by the petitioner to be possessed or controlled by the respondent.
- The law would additionally include recommendations for written policies and standards for law enforcement officers who request relinquishment of firearms.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill clarifies the timeframe in which a person served with a protective order must surrender any firearm(s) to law enforcement. This clarity will assist law enforcement and the parties in understanding the clear terms of the order, and result in better safety and protection for those protected by these vital orders. **NOTE: Same as Assembly Bill 2129.**

NOTES:

FIREARMS: FICTITIOUS INFORMATION

Penal Code Sections 12280 (Amended)
Chapter 668 / Senate Bill 1538

SUMMARY: .This bill increases the penalty for persons who are prohibited from owning a firearm to knowingly provide false or incomplete information to a firearms dealer in attempting to purchase a firearm, from a misdemeanor to a wobbler.

HIGHLIGHTS:

- Existing law regulates the transfer of firearms.
- Existing law requires the purchaser of any firearm shall be required to present clear evidence of his or her identity and age, to the dealer, and the dealer shall require him or her to sign his or her current legal name and affix his or her residence address and date of birth to the register, as required.
- Existing law provides that any person furnishing a fictitious name or address or knowingly furnishing any incorrect information or knowingly omitting any information required to be provided for the register is guilty of a misdemeanor.
- This law would also provide that any person who is prohibited from obtaining a firearm, as specified, who knowingly furnishes a fictitious name or address or knowingly furnishes any incorrect information or knowingly omits any information required to be provided for the register would be punished by imprisonment in a county jail not exceeding one year or imprisonment in the state prison for 8, 12 or 18 months.

.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: In order to help deter this illicit activity and prevent future crime, this bill makes the penalty for falsifying a gun application consistent with similar 'attempt' offenses by increasing it from a misdemeanor to an alternate felony/misdemeanor. Keeping firearms out of the hands of criminals may deter future criminal activity and save lives.

NOTES:

CHANGES IN

TRAFFIC

LAWS

VEHICLES: RECKLESS DRIVING / SPEED CONTEST

Vehicle Code Sections 23105, 23109.1
Chapter 432 / Assembly Bill 2190

SUMMARY: This bill increases the penalties for a conviction of reckless driving or speed contest when the driver proximately causes any specified injuries to another person. Punishment would be imprisonment in the state prison or in the county jail, and a fine.

HIGHLIGHTS:

This bill provides penalties for convictions of Section 23103 VC, reckless driving, when specific injuries are caused. When any of the specified injuries are caused, Section 23103 VC becomes a "wobbler" and officers would charge the violator with a felony. Under existing law, Section 23104 VC also prescribes penalties for Section 23103 VC, but prior convictions and great bodily injury must exist to elevate the violation to a "wobbler."

- This bill provides penalties for convictions of Section 23109 VC, speed contest, when specified injuries are caused. When any of the specified injuries are caused, Section 23109 VC becomes a "wobbler" and officers would charge the violator with a felony. Under existing law, Section 23109 VC prescribes penalties for speed contest, but prior convictions and serious bodily injury must exist to elevate the violation to a "wobbler."

- The specified, qualifying injuries for both Section 23105 VC and Section 23109.1 VC are:
  1) Loss of consciousness
  2) Concussion
  3) Bone fracture
  4) Protracted loss or impairment of function of a bodily member or organ
  5) Wound requiring extensive suturing
  6) Serious disfigurement
  7) Brain injury
  8) Paralysis

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill allows law enforcement officers to charge suspects with a felony for driving reckless or being involved in a speed contest and causing specified injuries without a prior conviction for reckless driving or being involved in a speed contest. The provisions of this bill are penalty enhancements, officers should still charge the suspect with either Section 23103 VC or Section 23109 VC.

NOTES:

VEHICLES: POLICE PURSUITS

Vehicle Code Sections 2800.4
Chapter 688 / Senate Bill 1735

SUMMARY: This law makes it a crime for a person to willfully flee or attempt to elude a pursuing peace officer by willfully driving on the wrong side of the roadway.

HIGHLIGHTS: This bill adds Section 2800.4 to the Vehicle Code (VC). This section makes it a misdemeanor or felony if a person willfully flees or attempts to elude a pursuing peace officer and the person operating the pursued vehicle willfully drives on a highway in a direction opposite to that in which the traffic lawfully moves upon the highway. A person convicted of this section would be punished by imprisonment for not less than six months or more than one year in a county jail or by imprisonment in the state prison, or by a fine of not less than $1,000 or more than $10,000, or by both fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill allows law enforcement officers to charge a person with a felony if they willfully flee or attempt to elude a pursuing peace officer by willfully driving on the wrong side of the roadway. The provisions of this bill are meant to deter criminals from driving on the wrong side of the roadway while willfully fleeing law enforcement.

NOTES:

UNSAFE OPERATION OF A MOTOR VEHICLE

Vehicle Code Sections 1656.3, 11219.3, 21070, 423001, 42001.19, 42002.1
Chapter 898 / Senate Bill 1021

SUMMARY: This law creates a new public offense of unsafe operation of a motor vehicle causing bodily injury or great bodily injury. A driver who violates any provision of Division 11 of the Vehicle Code, Rules of the Road, and that violation was the proximate cause of bodily injury or great bodily injury to another person can be charged with unsafe operation of a motor vehicle. This new offense is Section 21070 VC, an infraction punishable by a fine of $70 for causing bodily injury and by a fine of $95 for causing great bodily injury.

HIGHLIGHTS

Section 1656.3 VC was amended to require the California Driver's Handbook include the importance of respecting the right-of-way of others, particularly pedestrians, bicycle riders, and motorcycle riders.

Section 11219.3 VC was amended to require that the curriculum of traffic violator school includes information that emphasizes respecting the right-of-way of others, particularly with respect to pedestrians, bicycle riders, and motorcycle riders.

This law adds Section 21070 VC, creating the offense of unsafe operation of a motor vehicle with bodily injury or great bodily injury. A driver who violates any provision of Division 11 of the Vehicle Code and, as a result, proximately causes bodily or great bodily injury to another person can be charged with unsafe operation of a motor vehicle.

Section 42001 VC was amended pertaining to the punishments of infractions and misdemeanors. Subdivision (b), pertaining to the punishment for misdemeanor violations of Sections 2800, 2801, or 2803 of the Vehicle Code, was deleted. Those exact provisions became the newly added section, 42002.1 VC.

This law adds Section 42001.19 VC, which prescribes the fines for a violation of Section 21070 VC. A violation causing bodily injury is punishable by a fine of $70. A violation causing great bodily injury is punishable by a fine of $95.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Under the new law, officers can cite 21070 VC and the violation in Division 11 that directly caused the injury (e.g. 22450 VC). Law enforcement agencies will need to determine through policy which violation is more appropriate to cite.

The courts will not know which fine to impose for a conviction of Section 21070 VC unless the citation indicates which penalty is appropriate. One solution may be for officers to indicate that the violation caused "bodily injury" or "great bodily injury," which will then guide the courts to apply either Section 42001.19(a) VC, a $70 fine, or Section 42001.19(b) VC, a $95 fine.

Officers should never use Section 21070 VC as the primary collision factor or as an "other associated factor" in traffic collision investigations or reports.

NOTES:

DRIVING UNDER THE INFLUENCE: MANSLAUGHTER

Penal Code Sections 191.5, 192, 192.5, 193, 193.5
Chapter 91 / Assembly Bill 2559

SUMMARY: This bill reorganizes and simplifies the provisions of the Penal Code pertaining to vehicular manslaughter violations to clarify its interpretation without changing the associated penalties for these offenses.

HIGHLIGHTS:

- **Section 191.5 of the Penal Code (PC)** defines gross vehicular manslaughter while intoxicated as the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of specified Vehicle Code sections relating to driving under the influence of an alcoholic beverage or drug, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

  It further states that gross vehicular manslaughter while intoxicated also includes operating a vessel in violation of certain sections of the Harbors and Navigation Code relating to being under the influence of alcohol or drugs, and in the commission of an unlawful act, either not amounting to a felony, or one which might produce death, and with gross negligence.

  - Section 191.5 PC has been amended to pertain only to gross vehicular manslaughter and deletes subdivision (b), dealing with the operation of a vessel, and moves it to Section 192.5 PC. Section 191.5 PC now also includes vehicular manslaughter without gross negligence which was previously stated in Section 192(c)(3) PC. No other substantive changes were made.

- **Section 192 PC** describes manslaughter as the unlawful killing of a human being without malice and identifies the three types of manslaughter as voluntary, involuntary, and vehicular. It separates vehicular manslaughter into four subsections. These include:

  1. Driving a vehicle in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death; and **with** gross negligence.
  2. Driving a vehicle in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner; but **without** gross negligence.
  3. Driving a vehicle in violation of DUI statutes and in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner; but **without** gross negligence.
  4. Driving a vehicle where the collision was knowingly caused for financial gain and proximately resulted in the death of any person.

     - Section 192 PC now reflects the removal subsection (c)(3) pertaining to vehicular manslaughter without gross negligence. Other than renumbering, no further substantial changes have been made to this section.

- **Section 192.5 PC** provides regulations for vehicular manslaughter committed during the operation of a vessel. Under this section, vehicular manslaughter is defined as the operation of a vessel in the

commission of an unlawful act, not amounting to a felony **with** gross negligence, or operating a vessel in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence. It further includes the operation of a vessel in the commission of an unlawful act, not amounting to felony, but **without** gross negligence; or operating a vessel in the commission of a lawful act which might produce death, in an unlawful manner but without gross negligence.

- Section 192.5 PC now defines vehicular manslaughter as the unlawful killing of a human being without malice aforethought and would include the operation of a vessel in violation of specific Harbors and Navigation Codes, and **with** gross negligence as previously stated in Section 191.5 (b) PC. There were no further substantive changes other than organizational and grammatical alterations.

- **Section 193 PC** provides penalties for specific manslaughter charges.
  - Subsection (c)(3) of Section 193 PC was deleted as it references a subsection of Section 192 PC that no longer exists as a result of the reorganization. No other changes were made to this section.

- **Section 193.5 PC** provides penalties specific to manslaughter committed during the operation of a vessel.
  - **Section 193.5 PC** now includes the penalty for operating a vessel in violation of certain Harbors and Navigation Codes, and with gross negligence, as punishable by imprisonment in the state prison for four, six, or 10 years, as previously applied in 191.5 (c) PC. Other than renumbering, no other changes were made.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

This legislation does not present any substantive changes to the content of existing law. It simply reorganizes and renumbers certain sections of the Penal Code relating to vehicular manslaughter for the purposes of allowing these provisions to flow more logically.

Section 191.5 PC shall now be cited for the following violations:
- Gross vehicular manslaughter while intoxicated
- Vehicular manslaughter while intoxicated

Section 192 PC shall now be cited for the following violations:
- Voluntary Manslaughter
- Involuntary Manslaughter
- Vehicular manslaughter
  - With gross negligence
  - Without gross negligence
  - Driving a vehicle where the collision was knowingly caused for financial gain and proximately resulted in the death of any person.

Legal definition of gross negligence is:
- The exercise of so slight a degree of care as to exhibit a conscious indifference or "I don't care" attitude concerning the ultimate consequences of one's conduct. People v. Verlinde (App. 4 Dist. 2002) 123 Cal.Rptr.2d 322, 100 Cal.App.4th 1146.

NOTES:

MINORS; ZERO TOLERANCE

Vehicle Code Sections: 13390 VC, 42001 VC, 42001.25 VC, 42002.1 VC
Chapter 899 / Assembly Bill 2752

SUMMARY: This law makes it an infraction for a person under the age of 21 to drive a vehicle with .01 percent or greater blood alcohol concentration (BAC). Existing law only allows a civil action against the person's driver's license if they are under the age of 21 and are operating a vehicle with a .01 percent or greater BAC. Additionally, this law would increase the fines for a person under the age of 21 who drives a vehicle with a BAC of .05 percent or higher.

HIGHLIGHTS:

Section 13390 VC will be repealed. Repealing this section criminalizes the conduct prohibited by Section 23136 VC. By default, a violation of Section 23136 will become an infraction punishable pursuant to Section 42001 VC.

Section 42001 VC will be amended to delete subdivision (b) regarding people convicted of a misdemeanor violation of Section 2800 VC, 2801 VC, or 2803 VC.

Section 42001.25 VC will be added to proscribe the penalties for a conviction of Section 23140 VC. The proposed penalties are as follows:

1) A fine of $100.
2) A fine of $200 for a second offense within one year.
3) A fine of $300 for a third or subsequent offense within one year.

Section 42002.1 VC will be added to set forth the punishment for misdemeanor violations of Section 2800 VC, 2801 VC, or 2803 VC as follows:

1) A fine not exceeding $50 or imprisonment in the county jail not exceeding five days.
2) For a second conviction within a period of one year, a fine not exceeding $100 or imprisonment in the county jail not exceeding 10 days, or both that fine and imprisonment.
3) For a third or a subsequent conviction within a period of one year, a fine not exceeding $500 or imprisonment in the county jail not exceeding six months, or both that fine and imprisonment.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Under previous law, peace officers could not cite a minor for the Zero Tolerance law, 23136 VC, because it was subject only to civil penalty under Section 13390 VC. This new law deletes Section 13390 VC, allowing Section 23136 VC to be citable as an infraction.

NOTES:

PRIVATE PROPERTY TOWS

Vehicle Code Sections: 21100 VC, 22651.7 VC, 22658 VC, 22658.2 VC, 22953 VC, 40000.15 VC
Chapter 609 / Assembly Bill 2210

SUMMARY: A number of towing companies in California engage in the unscrupulous practice of illegally towing vehicles and then demand exorbitant fees for their return. Some of these practices include patrolling private parking lots and removing vehicles without the presence of the property owner, refusing to unconditionally release a vehicle to the owner before it has been removed from the private property, and unlawfully taking a vehicle within one hour of parking. This law enhances the protections provided to motorists from unfair vehicle towing practices and unauthorized vehicle towing from private property. This law also clarifies existing law by allowing local authorities to regulate tow truck service companies and operators by requiring licensure, insurance, and proper training in the safe operation of towing equipment. This law provides law enforcement with the necessary tools to protect consumers by establishing criminal penalties and strengthening consumer rights.

HIGHLIGHTS:

Section 21100 VC is amended to include legislative findings and declarations regarding the need to help ensure public safety by permitting local authorities to regulate tow truck companies and drivers in order to avoid violent confrontations, the stranding of motorists in dangerous situations, impeding the expedited vehicle recovery, and wasting state and local law enforcement's limited resources.

Section 22651.7 VC is amended to add a subdivision relating that this section would not authorize a person, other than a peace officer or regular employee or salaried employee who engages in directing traffic or enforcing parking laws, to immobilize a vehicle.

Section 22658 VC is amended to add the following new provisions:

- Signs posted on private property need to contain the name and telephone number of each towing company that would be a party to a written general towing authorization agreement with the owner or person in lawful possession of the property.
- Requires the tow truck operator, if the operator knew or was able to ascertain from the property owner, person in lawful possession of the private property, or the registration records, to immediately give, or cause to be given, notice in writing to the registered and legal owner of the fact of the removal, the grounds for the removal, and indicate the place to which the vehicle was removed. The notice is required to contain the mileage of the vehicle at the time of removal as well as the time of removal from the private property.
- An owner or person in lawful possession of private property, or an association of a common interest development, that causes the removal of a vehicle parked on private property is required to notify by telephone or, if impractical, by the most expeditious means available, the local traffic law enforcement agency within one hour after authorizing the tow.
- Requires a towing company or its driver to immediately and unconditionally release a vehicle that is not yet removed from private property and in transit, upon the request of the owner of the vehicle or the owner's agent. A person who fails to comply with this provision would be guilty of a misdemeanor. A towing company may impose a charge of not more than one-half of the regular towing charge for the towing of a vehicle at the request of the owner, the owner's agent, or the person in lawful possession of the private property pursuant to this section if the owner of the vehicle or the vehicle owner's agent returns to the vehicle after the vehicle is coupled to the tow truck by means of a regular hitch, coupling

device, drawbar, portable dolly, or is lifted off the ground by means of a conventional trailer, and before it is removed from the private property. The regular towing charge may only be imposed after the vehicle has been removed from the property and is in transit.

- A charge for towing or storage, or both, of a vehicle under this section is excessive if the charge exceeds the greater of the following:
  1) That which would have been charged for that towing or storage, or both, made at the request of a law enforcement agency under an agreement between a towing company and the law enforcement agency that exercises primary jurisdiction in the city in which is located the private property from which the vehicle was, or was attempted to be, removed, or if the private property is not located within a city, then the law enforcement agency that exercises primary jurisdiction in the county in which the private property is located.
  2) That which would have been charged for that towing or storage, or both, under the rate approved for that towing operator by the California Highway Patrol for the jurisdiction in which the private property is located and from which the vehicle was, or was attempted to be, removed.
- A towing operator is required to make available for inspection and copying his or her rate approved by the Department, if any, within 24 hours of a request without a warrant to law enforcement, the Attorney General, district attorney, or city attorney. A person who would knowingly charge a vehicle owner a towing, service, or storage charge at an excessive rate, or who would fail to make available his or her rate as required would be guilty of a misdemeanor.
- A storage facility is required to conspicuously display a notice visible to the public that advises all credit cards and cash would be acceptable means of payment. A person who refuses to accept a valid credit card or fails to post the required notice would be guilty of a misdemeanor.
- This amendment makes it an infraction for a private property owner, owner's agent, or lessee to improperly request a private property tow. A private property owner, owner's agent, or lessee is required to be present at the time of removal to verify the violation in most circumstances. This amendment however exempts a property owner, or the owner's agent who is not a tow operator, of a residential rental property of 15 or fewer units that does not have an onsite owner, owner's agent, or employee from being present at the time of removal and to verify the alleged violation. This amendment allows the tenant to verify the violation and provide the property owner or owner's agent with a signed request or electronic mail within 24 hours of the tow. The property owner or agent would be required to provide a copy of the request to the towing company within 48 hours of authorizing the tow. The signed request or electronic mail would have to contain the name and address of the tenant, and the date and time the tenant requested the tow. This amendment also requires the written authorization form to include specified information.
- Requires that a towing company provide a photocopy of the written authorization to the vehicle owner or an agent of the owner and further requires that the towing company redact the name and related information of the person that authorized the removal of the vehicle. A person who fails to comply with this provision would be guilty of a misdemeanor.
- The towing company has to provide the vehicle's owner a separate notice that provides the telephone number of the appropriate local law enforcement or prosecuting agency in case the vehicle owner feels their vehicle was wrongfully towed. A person who fails to comply with this provision would be guilty of a misdemeanor.
- In cases in which general authorization is granted to a towing company or its affiliate to undertake the removal of a vehicle that is unlawfully parked within 15 feet of a fire hydrant or in a fire lane, or that interferes with an entrance to, or exit from, private property, the towing company and the property owner, or owner's agent, or person in lawful possession of the private property are required to have a written agreement granting general authorization. The towing company is required to maintain the original written authorization or general authorization with the photographs for 3 years and make them available for inspection and copying without a warrant to law enforcement, the Attorney General, district attorney, or city attorney. A person who fails to comply with this provision would be guilty of a misdemeanor.

- This amendment makes **a towing company guilty of a misdemeanor** if they remove a vehicle from private property and fail to notify the local law enforcement agency of that tow within 60 minutes after the vehicle is removed from the private property and is in transit or 15 minutes after arriving at the storage facility, whichever time is less. This amendment also makes the towing company civilly liable for three times the amount of the towing and storage charges if they fail to notify the local law enforcement agency of a private property tow within 30 minutes after removing the vehicle from the private property. Towing companies would not have to make the required notifications within the specified timeframe if it is impracticable.
- Requires that a vehicle removed from private property be stored in a facility located within a 10 mile radius of the property from where the vehicle was removed.
- Requires a towing company to remain open during normal business hours and requires the towing company to have a public pay phone in the office area that is open to the public.
- Requires vehicle owners or authorized agents to immediately move their vehicle to a lawful location after release from a storage facility.

Section 22658.2 VC regarding private property towing from common interest developments is repealed. Elements of this section are now incorporated into Section 22658 VC.

22953 VC is amended to forbid an employee of private property, that is held open to the public for parking, from towing or removing a vehicle within one hour of the vehicle being parked. The amendment also allows a vehicle to be removed immediately after being parked illegally in a manner that interferes with an entrance to, or an exit from, the private property. A person who violates this section is civilly liable to the owner of the vehicle or his agent for two times the amount of the towing and storage charges. This amendment also changes the term “apartment complex” to “residential property.”

Section 40000.15 VC is amended to add subdivision (g), (j), (k), (l), or (m) of Section 22658 VC to the list of provisions that constitute a misdemeanor.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Peace officers can charge a misdemeanor if the towing company fails to notify the local law enforcement agency of a private property tow within 60 minutes after the vehicle was removed from the private property and was in transit or 15 minutes after arriving at the storage facility, whichever time is less.

NOTES:

SCHOOL BUS MECHANICS; COMMERCIAL VEHICLES

Vehicle Code Sections 13353.2, 15215, 15300, 15302, 16077, 22452
Chapter 574 / Assembly Bill 2520

SUMMARY: This omnibus bill allows mechanics to operate school busses without a school bus endorsement when they do not transport pupils or members of the public. This legislation also conforms state law to federal regulations mandated by the Federal Motor Carrier Safety Administration.

HIGHLIGHTS:

Several Vehicle Code section were amended or added as a result of AB 2520.

- Section 12525 VC was amended to allow mechanics or other maintenance personnel to operate vehicles requiring a schoolbus endorsement or specific certificates without obtaining a schoolbus endorsement or certificate if that operation is within the course of their employment and they do not transport pupils or members of the public.

- Currently, Section 13353.2 VC provides for the immediate suspension of the driving privilege on any person who was driving a motor vehicle when the person had a .08 percent or more, blood alcohol concentration level. It also provides for the immediate suspension of the driving privilege of individuals, under the age of 21, who have the blood alcohol concentration of .01 percent or more. AB 2520 amends this section to suspend the driver's license of a person who drives a vehicle, which requires the possession of a commercial vehicle license when the person has a .04 percent or more, blood alcohol concentration.

- Section 15215 VC was added to require the DMV to report each conviction of a person who holds a commercial driver's license from another state, occurring within this state, to the licensing state.

- Currently, Section 15300 VC provides that a driver of a commercial motor vehicle may not operate a commercial motor vehicle for a period of one year if the driver is convicted of a first violation of specified sections of the Vehicle Code relating to driving under the influence of drugs or alcohol, leaving the scene of an accident involving a commercial motor vehicle operated by the driver, and using a motor vehicle to commit a felony. This section was amended to add the one year suspension to drivers convicted of driving a motor vehicle while addicted to the use of any drug pursuant to subdivision (c) of Section 23152 VC. This legislation applies this penalty to leaving the scene of an accident involving a motor vehicle deleting the previously stated "commercial motor vehicle" specification.

- Currently, Section 15302 VC provides that a driver of a commercial motor vehicle may not operate a commercial motor vehicle for the rest of his or her life if convicted of more than one violation of specified sections of the Vehicle Code as well as other specific violations. These violations include driving under the influence of drugs or alcohol or causing injury while driving under the influence of drugs and alcohol. It also includes leaving the scene of an accident involving a commercial motor vehicle operated by the driver, as well as using a motor vehicle to commit a felony. Section 15302 VC was also amended to apply the same modifications to the violations as stated above in Section 15300 VC, removing the commercial vehicle requirement. This law now provides that a driver of a commercial motor vehicle may not operate a commercial motor vehicle for the rest of his or her life if convicted of more than one of the following violations:

-
  - Driving under the influence of alcohol or drug, or under the combined influence of any alcoholic beverage and drug, *while operating a motor vehicle*. Section 23152(a) VC.
  - Driving a vehicle with 0.08 percent or more blood alcohol content, *while operating a motor vehicle*. Section 23152(b) VC.
  - *Driving a vehicle while addicted to the use of any drug while operating a motor vehicle.* Section 23152(c) VC.
  - Driving a commercial motor vehicle with a blood alcohol level of 0.04 or more. Section 23152 (d) VC.
  - Driving under the influence of alcohol or drugs causing injury *while operating a motor vehicle*. Section 23153(a)(b) VC.
  - Driving a commercial motor vehicle with a blood alcohol level of 0.04 or more causing injury. Section 23153 (d).
  - Using a motor vehicle to commit a felony.
  - Driving a commercial motor vehicle when the driver's commercial driver's license is revoked, suspended, or canceled based on the driver's operation of a commercial motor vehicle.
  - Causing a fatality involving conduct defined pursuant to *subdivision (a) of Section 191.5 of the Penal Code or in subdivision (c) of Section 192 of the Penal Code.*
  - While operating a motor vehicle, refuses to submit to, or fails to complete, a chemical test or tests.
  - A violation of Section 2800.1, 2800.2, or 2800.3 that involves a commercial motor vehicle.

- Section 16072 VC and Section 16077 VC was amended to prohibit the issuance of a restricted driver's license to a commercial driver's license holder unless that person surrenders his or her commercial driver's license and is issued a non-commercial Class C or M driver's license.

- Currently, Section 22452 VC requires specific vehicles to stop between 15 and 50 feet from railroad tracks, look and listen for any approaching train and not to proceed until he or she can do so safely. It also provides for additional specific requirements when approaching or crossing a railroad track. Section 22452 VC was amended to require drivers of a commercial vehicle not specifically identified in this section to, upon approaching a railroad grade, drive at a rate of speed that allows the commercial vehicle to stop before reaching the crossing. It further prohibits the driver from driving upon, or over, the crossing until due caution is taken to ascertain that the course is clear.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This bill allows a mechanic or other maintenance personnel to operate a schoolbus without a schoolbus endorsement as long as it is within their course of employment and they do not transport pupils or members of the public. This bill also provides for stricter penalties for commercial violators who drive with a BAC of .04 or greater.

The Department of Motor Vehicles will develop protocol for the immediate suspension of the drivers' license for persons who drive a commercial motor vehicle with a 0.04 percent or more, blood alcohol concentration.

NOTES:

RIDING IN THE TRUNK OF A MOTOR VEHICLE

Vehicle Code Sections: 12810, 21712, 42001, 42002.1
Chapter 900 / Assembly Bill 1850

SUMMARY: This bill specifically prohibits the driver of a motor vehicle from allowing another person to ride in the trunk of that motor vehicle. Additionally, this law prohibits any person from riding in the trunk of a motor vehicle. A violation of these provisions is an infraction punishable by a fine of $100 for the first violation, $200 for a second violation, and $250 for a third or subsequent violation.

HIGHLIGHTS:

- Currently, Section 21712 VC prohibits the driver of a motor vehicle from knowingly permitting a person to ride on a vehicle or upon a portion of a vehicle that is not designed or intended for the use of passengers. This section also prohibits any person from riding on a vehicle or upon a portion of a vehicle that is not designed or intended for the use of passengers. A violation of these provisions is an infraction.

- This new law amends subdivision (c) of Section 21712 VC to provide that a driver of a motor vehicle shall not knowingly permit a person to ride in the trunk of that motor vehicle. Subdivision (d) of Section 21712 VC is also amended to provide that a person shall not ride in the trunk of a motor vehicle. A violation of subdivisions (c) or (d) is an infraction punishable by a fine of $100. A second violation within one year of a prior violation is punishable by a fine of $200. A third or subsequent violation occurring within one year of two or more prior violations is punishable by a fine of $250.

- This new law amends Section 12810 VC to provide that a violation of subdivision (d) of Section 21712 VC, relating to riding in a trunk, shall not be given a violation point count.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This legislation now specifically includes riding in a trunk or driving a motor vehicle with a person in the trunk as an infraction.

NOTES:

MOVE OVER, SLOW DOWN

Vehicle Code Sections: 21706.5 VC, 21809 VC, 25253 VC
Chapter 375 / Senate Bill 1610

SUMMARY: This law requires a person who is driving a vehicle on a freeway and approaching in a lane immediately adjacent to a stationary authorized emergency vehicle that is displaying emergency lights, or a stationary tow truck that is displaying flashing amber warning lights, to move out of that lane when safe and practicable, or slow to a reasonable and safe speed.

This law also creates an "Emergency Incident Zone," defined as an area on a freeway that is within 500 feet of, and in the direction of travel of, a stationary emergency vehicle with its emergency lights activated. Motorists are prohibited from operating a motor vehicle in an unsafe manner within an emergency incident zone. "Unsafe manner" is defined as any unlawful act contained in Division 11 of the Vehicle Code, except a violation of Section 21809 VC (move over / slow down).

HIGHLIGHTS:

This law adds Section 21706.5 VC, pertaining to emergency incident zones. An emergency incident zone is an area on a freeway that is within 500 feet of, and in the direction of travel of, a stationary authorized emergency vehicle that has its emergency lights activated. Traffic in the opposite lanes of the freeway would not be in an emergency incident zone. Subdivision (b) prohibits a person from operating a vehicle in an unsafe manner in an emergency incident zone. This section defines "operate a vehicle in an unsafe manner" to mean operating a motor vehicle in violation of Division 11 of the VC, except Section 21809 VC. The base fine for 21706.5 VC will probably be $70. Standard moving violations have a base fine of $35.

This law adds Section 21809 VC to provide that a person driving a vehicle on a freeway who is approaching a stationary authorized emergency vehicle displaying emergency lights, or a stationary tow truck displaying flashing amber warning lights, would be required to approach with due caution and, before passing in a lane immediately adjacent to the authorized emergency vehicle or tow truck, do one of the following:

1. Change lanes into a lane not immediately adjacent to the emergency vehicle or tow truck, if practicable and not prohibited by law.
2. If the maneuver described in (1) above would be unsafe or impracticable, slow to a reasonable and prudent speed that is safe for existing weather, road, and vehicular or pedestrian traffic conditions.

A violation of Section 21809 VC is an infraction punishable by a fine of not more than $50. The base fine has been set at $35. This section will be repealed on January 1, 2010.

This law amends Section 25253 VC, pertaining to tow trucks. Current law requires tow trucks used to tow disabled vehicles to be equipped with flashing amber warning lamps, and authorizes tow trucks to display flashing amber warning lamps while providing service to a disabled vehicle. This amendment provides that a tow truck is **not** authorized to display flashing amber lights on a **freeway** except when an unusual traffic hazard or extreme hazard exists. On January 1, 2010, the provisions of this amendment will be repealed and the provisions of 25253 VC, as they existed prior to this amendment, will go back into effect.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: Officers should realize that anytime they are on freeway with emergency lights activated on the patrol car, including rear amber lights, they will effectively be closing a lane of traffic adjacent to the patrol car. With that in mind, officers should only use emergency

lighting on a freeway when necessary.

Officers should use sound, professional judgment when citing violations of 21706.5 VC, 21809 VC, and 25253 VC.

NOTES:

VEHICLES: BUS CERTIFICATE APPLICANTS: CRIMINAL HISTORY CHECK, HEADLAMPS

Vehicle Code Sections 12517.3, 24400
Chapter 311 / Senate Bill 1586

SUMMARY: This bill provides the Commissioner of the California Highway Patrol with the authority to utilize the California Law Enforcement Telecommunications System (CLETS) to conduct a preliminary criminal and driver history check on applicants for a certificate to drive specified busses. It also requires motor vehicles be equipped and operated with at least two headlamps as specified.

HIGHLIGHTS:

Current law provides that applicants for an original certificate to drive a school bus, school pupil activity bus, youth bus, or general public paratransit vehicle shall be fingerprinted by the Department and submitted to the Department of Justice (DOJ) for processing. Departmental policy requires the School Bus Officer to critically review the criminal record information received from the DOJ for any information that may disqualify the applicant.

- This bill amends Section 12517.3 of the Vehicle Code (VC) to allow the Commissioner to utilize CLETS to conduct a preliminary criminal and driver history check on an applicant's eligibility for a certificate to operate an aforementioned bus.

Currently, Section 24400 VC requires that motor vehicles be equipped with at least two lighted headlamps during darkness and inclement weather and further provides specifications for the location of the headlamps.

- This bill amends this section to require that a motor vehicle be equipped with at least two headlamps and that the headlamps be lighted when operated during darkness, or inclement weather, or both.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT:

This bill is a clean up provision to the prior legislation requiring the use of headlamps during inclement weather. The old provision of law had been interpreted as an equipment violation. The new language clearly makes operation of a motor vehicle during darkness or inclement weather, without headlamps, a moving violation.

Cite the following Vehicle Code sections for headlamp violations:

- 24400(a)(1) VC – Equipment Violation.
- 24400(a)(2) VC – Failure to Operate.

NOTES:

WIRELESS TELEPHONES

Vehicle Code Sections 12810.3, 23123
Chapter 290 / Senate Bill 1613

SUMMARY: This bill makes it an infraction to operate a motor vehicle while using a wireless telephone without a hands-free device. This section does not apply to people using a wireless telephone for emergency purposes or to emergency services professionals using a wireless telephone while operating an authorized emergency vehicle. This section does not apply to a person using a digital two-way radio service that utilizes a wireless telephone if such telephone is utilized in a way that would not require it to be in the immediate proximity of the ear while operating a motor truck or truck tractor that requires either a Class A or Class B driver's license, an implement of husbandry, farm vehicle, tow truck, or a commercial vehicle that is registered to a farmer and driven by the farmer or an employee of the farmer under specified conditions.

HIGHLIGHTS:

This law adds Section 12810.3 VC. This section states that a violation of Section 23123 VC will not result in a violation point count.

This law adds Section 23123 VC.

- Subdivision (a) prohibits a person from driving a motor vehicle while using a wireless telephone unless it is used in a hands-free fashion.
- Subdivision (b) establishes a fine of $20 for a first offense and a $50 fine for each subsequent offense.
- Subdivision (c) provides an exemption for any person to use a wireless telephone for an emergency purpose.
- Subdivision (d) exempts emergency personnel driving an authorized emergency vehicle so long as the use of the wireless telephone is during the course and scope of their duties.
- Subdivision (e) allows a person to use a digital two-way radio service that utilizes a wireless telephone if such telephone is utilized in a way that does not require it to be in the immediate proximity of the ear while operating a motor truck, truck tractor that requires either a Class A or Class B driver's license, an implement of husbandry, farm vehicle, tow truck, or a commercial vehicle that is registered to a farmer and driven by the farmer or an employee of the farmer, and is used in conducting commercial agricultural operations, including, but not limited to, transporting agricultural products, farm machinery, or farm supplies to, or from, a farm.
- Subdivision (f) exempts a person driving a school bus or transit vehicle that is subject to Section 23125 VC.
- Subdivision (g) exempts a person driving a motor vehicle on private property.
- This law becomes operative on July 1, 2008, and will remain in effect until July 1, 2011.

Effective July 1, 2011, the push to talk exception is repealed and no push to talk exemptions will exist.

WHAT THIS BILL MEANS TO LAW ENFORCEMENT: This law becomes operative on July 1, 2008 so there may be changes to it in this legislative year.

NOTES:

CASE LAW

SUMMARIES

People v. Wells

(2006) 38 Cal.4th 1078

SUBJECT: Detentions

RULE: An officer may conduct a limited traffic stop of a vehicle based solely on an uncorroborated phoned-in tip that accurately describes the vehicle and its location and indicates the caller had actually witnessed contemporaneous driving indicating a possibly intoxicated person is behind the wheel.

FACTS: A California Highway Patrol Officer received a radio call at 1:43 a.m. concerning a possible under-the-influence driver ("DUI") who was "weaving all over the roadway." A reasonably unique vehicle description was included: an 80's model blue van. According to the dispatcher, the van was northbound on Highway 99 at a particular cross street, north of Bakersfield. The person reporting this information to the CHP dispatcher did so anonymously. The officer positioned himself about two to three miles north of that location. Two to three minutes later, the van was observed heading northbound, as predicted, traveling at about 50 mph. Although the van did not weave, speed or otherwise violate any traffic rules ("perhaps because (the officer) stopped the van so soon after spotting it"), the officer stopped it anyway to check the driver's condition. Upon contacting the driver (i.e., the defendant), the officer noted indications that she was under the influence of drugs. Defendant was subsequently arrested; she tested positive for various drugs; and an inventory search of her car resulted in recovery of heroin in addition to some paraphernalia. Her motion to suppress the evidence was denied by the trial court. An appeal followed and the case was eventually heard by the California Supreme Court.

HELD: An officer may detain (i.e., conduct a limited traffic stop) of a vehicle based solely on an uncorroborated phoned-in tip that accurately describes the vehicle and its location and relates that a possibly intoxicated person is behind the wheel, "weaving all over the roadway." The court found the circumstances in this case provided an exception to the general rule (announced in *Florida v. J.L.* (2000) 529 U.S. 266) that anonymous information alone does not constitute reasonable suspicion: "[A] report of a possibly intoxicated highway driver, 'weaving all over the roadway,' poses a far more grave and immediate risk to the public than a report of mere passive gun possession (as occurred in *Florida v. J.L.*)" The court noted several circumstances existed rendering the stop reasonable: (i) the exigency of a DUI driver loose on the road, with all the damage DUI drivers do, justifies an immediate law enforcement response; (ii) a report from a citizen describing a contemporaneous event of reckless driving, presumably viewed by the caller, adds to the reliability of the information and reduces the likelihood that the caller is merely harassing someone; (iii) the level of intrusion upon one's personal privacy (in a public place where there is a reduced expectation of privacy) and the inconvenience involved in a brief vehicle stop is considerably less than an "embarrassing police search" on a public street as occurred in *Florida v. J.L.*; and (iv) the relatively precise and accurate description given by the tipster regarding the vehicle type, color, location and direction of travel added to the reliability of the information. In light of these factors, the officer's inability to detect any erratic driving himself is not really relevant. The stop in this case, therefore, was done with the necessary reasonable suspicion, and lawful.

NOTES:

People v. Brendlin

(2006) 38 Cal.4th 1107

SUBJECT*:* Traffic Stops and the Detention of a Passenger

RULE: The passenger in a vehicle stopped for a traffic infraction (whether the stop is legal or not) is *not* detained by virtue of the traffic stop alone.

FACTS: On November 27, 2001, Deputy Robert Brokenbrough observed a Buick Regal with an expired registration tab driving through Yuba City and conducted a radio registration check. The deputy determined that, although the car's registration had expired two months earlier, application for a renewed registration was "in process." The deputy could also see taped in the vehicle's rear window a temporary operating permit on which was printed the number "11," indicating that the permit was good for another 3 days (i.e., to the end of November). From his vantage point, the deputy could not determine, however, whether the permit was actually for that vehicle. He therefore decided to stop the car to investigate further. While asking the driver for her license, the deputy recognized the passenger as one of the Brendlin brothers, Scott or Bruce. He knew that one of the brothers was a parolee-at-large ("PAL") with an outstanding warrant for his arrest. When asked to identify himself, defendant falsely replied that his name was Bruce Brown. During this exchange, the deputy could see in plain sight in the car containers of substances commonly used in the production of methamphetamine. Verifying that a no-bail PAL warrant was outstanding for Bruce Brendlin, Deputy Brokenbrough arrested defendant at gunpoint. Methamphetamine, marijuana, syringes and other narcotics paraphernalia were recovered from both defendant and the driver of the car. Defendant's motion to suppress all this evidence, arguing that the traffic stop and his subsequent detention were illegal, was denied. Upon appeal, the court reversed, finding that the defendant was detained by virtue of the traffic stop, which was illegal.. The State petitioned to the California Supreme Court.

HELD: The California Supreme Court, in a split 4-to-3 decision, reversed, reinstating defendant's conviction. As to the legality of the vehicle stop (i.e., to check the validity of the temporary operating permit), the Court declined to discuss that issue because the Attorney General, on appeal, abandoned any attempt to justify it. Instead, the AG argued that defendant, as a mere passenger in the vehicle, was never "*detained*" irrespective of the legality of the traffic stop, at least until the officer had probable cause to arrest him on the outstanding warrant. In discussing this issue, the Court noted a number of lower appellate court cases dealing with the legal status of a passenger in a vehicle when the driver is being stopped as a result of a traffic-related offense. Despite the majority of courts holding that a passenger is necessarily "*seized*" (i.e., "*detained*") just by being in the car, the Court here held to the contrary. Citing the U.S. Supreme Court, this Court noted that: "a Fourth Amendment seizure does not occur (just because) there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and *desired* termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied.*" (Italics in original.) In other words, even though the officer in this case interrupted defendant's freedom of movement by stopping the car in which he was a passenger, the interruption was not intentional. Had defendant chosen to walk away (absent safety concerns—see Note, below—and up until probable cause to arrest him was developed), he would have been free to do so. A detention does not occur until the person is actually taken into custody "whether by the application of physical force or by submission to the assertion of authority." Defendant in this case, as a mere passenger in the vehicle, was not subjected to any such

"assertion of authority." "(T)he passenger is free to disregard the police and go about his or her business . . (T)he incidental restriction of the passenger's freedom of movement is therefore not a seizure." The legality of the traffic stop, therefore, is irrelevant. When the officer later recognized him as a possible fugitive—a fact verified by radio—defendant could be, and in fact was, lawfully arrested at that point. Any evidence subsequently seized as a product of that lawful arrest was properly admitted into evidence.

NOTE: The Supreme Court declined to decide whether an officer can make a traffic stop to verify the validity of an apparently valid temporary operating permit in a car's window. The only case addressing this issue, and finding it illegal, is *People v. Nabong* (2004) 115 Cal.App.4th Supp. 1. On another issue, an officer may order a passenger to get back into or remain inside a vehicle, at least when the officer can cite safety concerns for making such an order. (See *United States v. Williams* (9th Cir. 2005) 419 F.3d 1029; and *People v. Castellon* (1999) 76 Cal.App.4th 1369.) This would likely be held to be a detention, however, so you need to be able to articulate why, in your particular case, you believed the passenger might be a danger to you if allowed to walk away or otherwise remain outside the car.

NOTES:

People v. Saunders

(2006) 38 Cal.4th 1129

SUBJECT: Search and Seizure: Traffic Stops; Temporary Operator Permits

RULE: Officers may lawfully stop a motor vehicle with an ostensibly valid temporary operating permit, when that vehicle also has an expired registration tab and a missing front license plate, to investigate its current registration status.

FACTS: San Jose Police Officers observed a pickup truck following 15 to 20 riders from the "Soul Brothers" motorcycle club. The officers knew that the Soul Brothers club is associated with the Hell's Angels, and that the Hell's Angels had an on-going dispute with the rival Mongols motorcycle club. These clubs were engaged in an annual ritual which had in the past involved the carrying of automatic firearms. The officers further knew that a vehicle closely following a group of motorcycle club members is often a "load" or "tail" car, which could be expected to be carry other club members or girlfriends, weapons, and drugs. This particular pickup was missing a front license plate and had an expired license tab affixed to the rear plate. Though unnoticed by the officers, the pickup displayed a temporary operating permit taped to the inside of the rear window with the number "3" (representing the month of "March"), allowing for the vehicle's lawful operation for the rest of that day (March 31st). The officers stopped the pickup and contacted the driver, who was determined to be driving on a suspended driver's license. Defendant, the sole passenger, was also contacted and asked for identification. After the officers decided to impound the vehicle, both driver and defendant were ordered out of the pickup. Both were wearing leather jackets with "Soul Brothers" patches. Defendant appeared to be very nervous, "shaking and trembling." Noting that defendant's "large and bulky" jacket covered his waistband, where weapons are often concealed, one officer decided to pat defendant down for weapons. He first asked him, however, if he had anything illegal on him. Defendant responded that he had a gun in his pocket. A loaded .25-caliber semiautomatic pistol was recovered from an inner pocket of defendant's jacket. Ammunition was subsequently found under the pickup's seat. Charged with various offenses related to the firearm possession, including being a felon in possession of a firearm and ammunition, defendant's motion to suppress the gun and ammunition was denied. After the District Court of Appeal upheld his conviction in an unpublished decision, defendant petitioned to the California Supreme Court.

HELD: The California Supreme Court affirmed defendant's conviction, unanimously agreeing that the stop was legal. Based upon the Court's decision in *People v. Brendlin* (discussed above), four of the seven justices held that defendant was not even detained up until the point when he was ordered out of the truck. But because he was detained prior to discovery of the illegal firearm, the legality of the initial traffic stop was relevant and subject to defendant's challenge. A reasonable suspicion to believe that a vehicle is unregistered is sufficient cause to stop the vehicle and investigate that possibility. Citing out-of-state cases, the Court noted that there is a split of authority whether the necessary reasonable suspicion that a car is unregistered exists when the vehicle has an expired registration tab *and* an ostensibly current temporary operating permit. The Court then determined, however, that that particular issue did not need to be decided here because the vehicle in which defendant was riding was also missing a front license plate. California law requires that when two license plates are issued, both must be displayed on the vehicle. (Veh. Code, § 5200.) California issues two license plates for pickups. While a temporary operating permit allows for the lawful operation of an otherwise unregistered motor vehicle, it does not excuse the lack of one plate where, as evidenced by the presence of a rear plate, plates had been issued to that vehicle. When one plate is lost, Department of Motor Vehicles rules require that the other must be surrendered pending the issuance of

new plates. At the very least, the missing front plate gave the officer sufficient reasonable suspicion of a Vehicle Code section 5200 violation to justify a traffic stop for the purpose of investigating the validity of the temporary operating permit. Therefore, the stop of the vehicle in which defendant was a passenger was lawful. As such, his detention and subsequent pat down for weapons were also lawful.

NOTE: It is important to note that the Supreme Court does *not* answer the question whether a motor vehicle with an apparently valid temporary operating permit can be stopped to check the validity of that permit in those circumstances where the car has either both license plates or no plates at all. The only controlling authority in those situations is still *People v. Nabong* (2004) 115 Cal.App.4th Supp. 1, which says that such a stop is illegal.

NOTES:

United States v. Choudhry

(9th Cir. 2006) 461 F.3d 1097

SUBJECT: Detentions

RULE: Officers may detain a defendant for a parking violation and it will be upheld regardless of the officer's subjective motivations for making the detention.

FACTS: A pair of police officers spotted a car parked illegally in an area designated as a no-stopping/tow away zone between the hours of 10 p.m. and 6 a.m. every day. The officers illuminated the car with their spotlight. The occupants of the vehicle (one of whom was the defendant) made hurried movements leading the officers to believe they may have been engaging in a sexual encounter or some other illegal act. The officers decided to investigate further, turned on their emergency lights and commanded the driver of the car to stop as she attempted to drive off. The driver stopped. The officers learned the driver had outstanding warrants. One thing led to another and the defendant was ordered out of the car. Eventually, the officers conducted a search of the car. They found a gun inside the car which was ultimately determined to belong to the defendant. Defendant challenged the detention, alleging the police had no right to make a traffic stop for a "parking violation."

HELD: Police officers have the right to make investigatory stops based on reasonable suspicion that a parking violation has occurred. This holds true regardless of the fact that a parking violation is not treated as an infraction within the criminal justice system but a civil offense subject to civil penalties and administrative enforcement. In the instant case, the officers specifically had authority to enforce the parking violation because the defendant had parked the vehicle in an area that a local city ordinance had designated as a no parking/tow-away zone between the hours of 10:00 p.m. and 6:00 a.m. California Vehicle Code section 22651(n) allows "[a]ny peace officer ··· engaged in directing traffic or enforcing parking laws and regulations" to remove a vehicle "[w]henever any vehicle is parked or left standing where local authorities, by resolution or ordinance, have prohibited parking and have authorized removal of vehicles." Moreover, the rule announced in *Whren v. United States* (1996) 517 U.S. 806, that it does not make a difference whether the officers' real interest in making the stop was to investigate some greater offense for which the officer did not have sufficient reasonable suspicion, applies equally when the offense being investigated is a parking violation.

NOTES: The court did not address the question of whether the officer's observations regarding the conduct of defendant and the driver would have provided independent grounds for making the detention.

NOTES:

People v. Hunter

(2006) 133 Cal.App.4th 371

SUBJECT: Search and Seizure: Vehicle Search

RULE: Discovery of a limited amount of contraband in the passenger area of a vehicle establishes probable cause to believe more such contraband may be found in the trunk, justifying a warrantless search of the trunk.

FACTS: Defendant was stopped for a loud muffler by uniformed officers of the crime suppression unit of the Vallejo Police Department. As defendant's car was being stopped, a passenger in the back seat looked back at the officers several times and moved around suspiciously. None of the occupants were wearing seatbelts. Defendant admitted that the vehicle was his. The passenger in the back seat told officers that he was a CYA parolee; a fact that was later verified. Also, the right front seat passenger was recognized as a local drug dealer with numerous prior law enforcement contacts. For reasons of officers' safety, all three individuals were asked to step out of the car. As they did so, one of the officers observed on the back seat a knotted clear plastic sandwich bag containing a green residue, which he recognized as marijuana. While reaching in to retrieve the baggie, the officer noticed a second baggie of marijuana in an open ashtray. Defendant claimed ownership of this bag, which was later determined to contain usable amount of marijuana. Based on all of this information, the officers decided to search the entire vehicle, including the trunk. Although defendant denied having a key for the trunk, one was found on the keychain hanging in the ignition. Nothing more was found in the passenger area of the vehicle. However, 14 baggies of marijuana, a firearm and ammunition, and two masks were found in a backpack in the trunk. Defendant was arrested and transported to the station, where he was thoroughly searched. This search resulted in the recovery of nine rocks of cocaine and $195 in cash. In an expert's opinion, the marijuana and cocaine were possessed for purposes of sale. At the preliminary hearing, the magistrate granted defendant's motion to suppress all the evidence found in the trunk and on his person, finding that the mere fact that contraband was found in the passenger area of the car did not give officers the right to search the trunk (or, as "*fruit of the poisonous tree*," his person during the later search at the police station). The People appealed from the dismissal of the case.

HELD: The First District Court of Appeal reversed, reinstating the charges against the defendant. The preliminary hearing magistrate, in suppressing the evidence found as a result of the search of the trunk and defendant's person, relied upon the California Supreme Court case of *Wimberly v. Superior Court* (1976) 16 Cal.3d 557. *Wimberly* held that finding a limited "*personal*" amount of marijuana in the passenger area of a vehicle did not establish probable cause to believe that more contraband would be in the trunk. Here, the Court first held that the rule of *Wimberly* does not apply because the officers in this case were acting on more than just a personal amount of marijuana in the passenger area of defendant's car. They also knew that they had a known drug dealer in the right front passenger seat, a CYA parolee (who was acting suspiciously at the time of the stop) in the rear seat, and defendant lying about having a key to the trunk. Secondly, they held that *Wimberly* no longer good law. Subsequent United States Supreme Court authority has held that if there is probable cause justifying the search of the passenger area of a lawfully stopped vehicle, then the *entire* vehicle and its contents are subject to a warrantless search. (*United States v. Ross* (1982) 456 U.S. 798.) *Ross*, in effect, has overruled *Wimberly*. Due to passage of Proposition 8 (The "*Truth in Evidence*" Initiative of June 1982), California courts are bound to follow *Ross*. This rule has

already been set out in *People v. Dey* (2000) 84 Cal.App.4th 1318, and should have been followed by the preliminary hearing magistrate. The evidence, therefore, should not have been suppressed.

NOTE: The Court did note that there may be circumstances where police officers will *not* have probable cause to believe that there is also something in the trunk. For example, knowing through observation exactly where contraband has been placed in a vehicle will not, by itself, give you probable cause to search the whole vehicle. In effect, the more *non-specific* the information is concerning the location of contraband in a vehicle, the more likely a warrantless search of the entire vehicle will be upheld. Watching a bag of dope being placed into a car will give you probable cause to retrieve and search that bag, but not the rest of the car absent other suspicious circumstances. Also note that attempting to justify the search of the trunk as incident to the defendant's arrest wouldn't have worked, as the court pointed out in a footnote, because in this case the officers did not have probable cause for a "*custodial*" arrest (i.e. one involving the transportation of the defendant) until after they got into the trunk. Moreover, a "*search incident to arrest*" is generally going to be limited to the passenger area of the vehicle, i.e. the "*lunging area*." (*New York v. Belton* (1981) 453 U.S. 454, 460.)

NOTES:

United States v. Weaver

(9th Cir. 2006) 433 F.3d 1104

SUBJECT: Searches Incident to Arrest

RULE: A 10-to-15-minute delay between an arrest in a vehicle and the search of that vehicle, with no intervening circumstances, is still a lawful "search incident to arrest."

FACTS: Sergeant Hignight, in an unmarked sheriff's vehicle, observed a person he knew to have outstanding arrest warrants in the passenger seat of a vehicle that pulled up next to him. Hignight also knew that that person was the subject of an investigation involving stolen checks. Hignight called for a marked patrol unit to stop the vehicle. Defendant, the driver, was detained after the passenger was arrested. After defendant declined to consent to the search of her car, Hignight decided that he was going to search it anyway. Pursuant to his "typical procedure," Hignight called for another unit so that he could have one deputy to watch the subjects and a second deputy observe him conducting the search. It took 10 to 15 minutes for the second patrol unit to arrive during which time "nothing happened." Upon the arrival of the second patrol deputy, Sgt. Hignight searched defendant's car. A black organizer containing 46 blank personal checks, which were stolen days earlier from a postal customer, was found on the floor behind the driver's seat. Defendant was a postal letter carrier assigned to the route from which the checks were stolen. Defendant and her arrested passenger were later connected to a series of some 35 stolen and forged checks. Charged in federal court with embezzlement of "mail matter" by a postal service employee (18 U.S.C. § 1709), defendant's motion to suppress the evidence recovered from her car was denied. She subsequently pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction, finding the search to have been a lawful "*search incident to arrest*." To qualify as a "search incident to arrest," for which no search warrant, or even probable cause, is necessary, it need merely be shown that an occupant of the vehicle to be searched was arrested, and that the search is "*roughly contemporaneous with* (that) *arrest*." Noting that the "*contemporaneity*" of the search relative to the arrest is important, it is not the only thing to be considered. "The relevant distinction turns not upon the moment of the arrest versus the moment of the search, but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former." Here, the sergeant waited for another deputy to assist for safety reasons. While waiting only some ten to fifteen minutes, nothing occurred that could have been considered an "intervening" act separating the arrest from the search. Under these circumstances, the eventual search is sufficiently "*roughly contemporaneous*" with the arrest to qualify as a search incident to arrest. The search, therefore, was lawful.

NOTE: The court also briefly discussed some intervening acts which may make a search no longer contemporaneous with an arrest, such as towing the arrestee's vehicle before searching it (see *United States v. Ramos-Oseguera* (9th Cir. 1997) 120 F.3d 1038, 1036, overruled on other grounds by *Apprendi v. New Jersey* (2000) 530 U.S. 466, 489-490) and questioning a handcuffed arrestee on various issues during a 30-to-45-minute delay between the arrest and search (see *United States v. Vasey* (9thCir. 1987) 834 F.2d 782-787-788.) However, the court also cited a case which held that a five-minute delay while an officer completed vehicle impound paperwork was not an intervening act. (*United States v. McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892.)

NOTES:

People v. Ramirez

(2006) 140 Cal.App.4th 849

SUBJECT: Detentions; Pedestrians in the Roadway and Vehicle Code section 21954, subdivision (a)

RULE: Crossing diagonally across an intersection without interfering with any traffic is not justification for a detention.

FACTS: Defendant was observed by a police officer crossing diagonally across the street at a four-way stop intersection. The officer was in his patrol vehicle driving up to the intersection when he observed defendant. There were no other vehicles on the road. Defendant had walked three-quarters of the way across the street, up to within a few feet of the officer's patrol vehicle, when he suddenly noticed the officer. He then turned and started to walk back in the direction from where he had come. Recognizing defendant as a local gang-banger, and believing him to be in violation of Vehicle Code section 21954, subdivision (a), the officer called to him by name; "*Oscar*. *Hey, hold on*. *I want to talk to you*." When told to put his hands on his head, defendant decided to run instead. He was caught within a few feet, however. When asked if he had anything on him, defendant admitted to carrying a gun in his pocket. Defendant was later charged with carrying a loaded, concealed pistol (Pen. Code, §§ 12025, subd. (a)(2), 12031, subd. (a)(1)) with a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(A)). After his motion to suppress was denied, defendant pled "no contest" and appealed.

HELD: The Second District Court of Appeal (Div. 1) reversed. The legal basis claimed for stopping and detaining defendant was that he had violated Vehicle Code section 21954, subdivision (a). Section 21954, subdivision (a), makes it illegal for a "pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection (to fail to) yield the right-of-way to all vehicles upon the roadway so near as to constitute an immediate hazard." While defendant was certainly in a roadway other than in a crosswalk, there was no evidence that he in a position where he constituted an "immediate hazard" to any vehicles. The only other car in the area was the police car with the officer coming up to a stop sign where he was required to come to a stop. Defendant was not failing to yield the right-of-way to anyone under these circumstances. Also, defendant was not guilty of Penal Code section 148 (delaying or obstructing an officer in the performance of his duties) by attempting to run in that an element of this offense is that the officer be acting in the "*performance of his duties*." The officer does not have a *legal duty* to detain anyone without at least a reasonable suspicion that the person was engaged in some illegal activity. Defendant was not doing anything illegal. Also, the officer's "*good faith*" belief that he had cause to stop defendant does not apply in that "*good faith*" cannot be based upon a "*mistake of law*." Therefore, since defendant was unlawfully detained, the illegal pistol in his pocket should have been suppressed.

NOTE: It's hard to argue with the reasoning in this case. If you're going to base a stop on an alleged violation of some traffic infraction, you need to know all the elements of that offense. It would have been a better idea to attempt a "*consensual encounter*" (e.g., "*Hey Oscar*; *do you mind talking to me for a moment*?") as opposed to a detention ("*Oscar*. *Hey, hold on*. *I want to talk to you*.") Setting up the contact as a consensual encounter would have given the prosecutor *two* arguments in court; i.e., that the officer had cause to lawfully detain him, and, failing that, he was only consensually encountered anyway. A prosecutor only needs to win one of these arguments to avoid losing the seized evidence.

NOTES:

In re Jose Y.

(2006) 141 Cal.App.4th 748

SUBJECT: Pat Downs on a High School Campus

RULE: A pat down of a person on a high school campus who appears to have no business there does *not* require a reasonable belief that he may be armed and dangerous.

FACTS: A campus security officer observed three minors sitting on the grass in front of South Gate High School. Not recognizing them as students at that school, the security officer told Officer Tommy Chung; a Los Angeles Police Officer assigned to that school. Officer Chung contacted the three minors and asked them for identification. All three said that they had no identification, although defendant produced a registration form from another school with his name on it. Officer Chung decided to take the three minors to his office in order to verify their identities and determine what school they attended. But because he was alone, he decided to pat the three minors down for his own safety. In so doing, he recovered a "locking blade knife;" a violation of Penal Code section 626.10, from defendant's pants pocket. Defendant was charged by petition in juvenile court. His motion to suppress the knife was denied. He appealed from the Juvenile Court's order sustaining the petition.

HELD: The Second District Court of Appeal (Div. 4) affirmed. While not even deciding whether the officer in this case had a reasonable suspicion to believe defendant might be armed, the court held that when confronted with a person on a high school campus who appears to have no business there, a reasonable belief that he may be armed and dangerous is not necessary. Balancing the governmental interest in maintaining a safe and orderly environment for learning with a suspect's privacy rights, the former will take precedence over the relatively limited intrusion of a pat down for weapons and its "minimal invasion of (defendant's) privacy rights." Patting defendant down for weapons, therefore, was lawful.

NOTE: Does L.A.P.D. then have the advantage of a different, lower standard for pat downs?, you might ask. No, they don't. What was not discussed here is the fact that a "school resource officer," although employed by a municipal police department, need only comply with the relaxed search and seizure standards applicable to school officials when working on campus helping to enforce school rules as well as Penal Code violations. (*In re William V.* (2003) 111 Cal.App.4th 1464.) And in this era of seemingly random school shootings and similar violence, such a relaxed legal standard for justifying a detention (*In re Randy G.* (2001) 26 Cal.4th 556; *In re Joseph F.* (2000) 83 Cal.App.4th 501), or a search (*In re William G.* (1985) 40 Cal.3d 550; *In re Latasha W.* (1998) 60 Cal.App.4th 1524), and now a pat down, is a good thing, at least if you worry about your kids coming home after school. Whoever came up with the idea that delinquent juveniles should have constitutional rights anyway, should have their head examined. But at least on a K through 12th grade school campus, law enforcement has been given the green light, short of an arbitrary, capricious, or harassing manner (*Randy G., supra*), and within reasonable limits, to do what is necessary to insure the safety of our children's teachers and the students themselves.

NOTES:

In re Leon S.

(2006) 133 Cal.App.4th 1556

SUBJECT: Trespassing on School Property, per Penal Code section 626.2

RULE: Trespassing on school grounds, per Penal Code section 626.2, requires proof of registered or certified notice being mailed to the juvenile's home address.

Facts: Defendant minor was suspended by the high school's Assistant Principal, Tad Scott, for two days for an incident which, other than to say that it involved defendant being "abusive," was not described. Defendant reacted to the news of the suspension by becoming even more "disruptive, uncooperative, and cursing." Defendant also "brushed" up against Scott during the resulting confrontation. His rapidly deteriorating attitude was rewarded with an extra day of suspension for a total of three days. Scott wrote up the notice of suspension and, after explaining to defendant that he was not allowed back on the campus for the three days of his suspension, had him sign it. Scott then either gave defendant a copy, or gave all copies to his secretary (depending upon which part of his testimony was to be believed), and called defendant's mother. Scott told her that her son was suspended for three days, although she remembered being told two days. She told Scott to have her son walk home. The notice of suspension was given to Scott's secretary whose job it was to provide the offending student with a copy and to mail it by registered or certified mail to the student's home. Two days later, defendant's mother, who denied ever receiving the notice of suspension, drove defendant back to school. He was later contacted by a campus supervisor in the attendance office "yelling at the clerks." Although being told that he was still on suspension, he refused to leave. The police were called, but defendant, "acting belligerent," continued to refuse to leave. He was arrested for trespassing on the school grounds, per Penal Code section 626.2. A Juvenile Court petition was sustained (with other counts of disturbing the peace of a school and threatening a public officer being dismissed). Defendant appealed.

HELD: The First District Court of Appeal (Div. 5) reversed, but only because all of the elements of Penal Code section 626.2 were not proved. Section 626.2 reads in relevant part: "Every student . . . who, after a hearing, has been suspended . . . from . . . a school for disrupting the orderly operation of the campus or facility of such institution, and as a condition of such suspension . . . has been denied access to the campus or facility, or both, of the institution for the period of the suspension . . . ; who has been served by registered or certified mail, at the last address given by such person, with a written notice of such suspension . . . and condition; and who willfully and knowingly enters upon the campus or facility of the institution to which he or she has been denied access, without the express written permission of the chief administrative officer of the campus or facility, is guilty of a misdemeanor." Defendant, on appeal, argued that there was no proof that he had ever been mailed a registered or certified copy of the suspension and that he had been according a pre-suspension hearing. Agreeing with the first argument, the Court didn't even get to the fact that there was no evidence of a hearing. Assistant Principal Scott testified only to having given his secretary a copy of the notice to be mailed to defendant's home. There was no proof that the suspension notice had ever been mailed to defendant's home, or that if it had, it was done by registered or certified mail. The statutory presumption that an official duty has been "regularly performed" (Evid. Code, § 664) does not apply to the duties of a secretary, and even if it did, the presumption was rebutted by the testimony of defendant's mother that she never received the suspension notice. Given this lack of proof, not all the elements of Penal Code section 626.2 were met. The petition, therefore, should not have been sustained.

NOTE: Someone should have taken the time to simply sit down and read the elements of Penal Code section 626.2, if it is charged. The net result is that one more juvenile delinquent has been taught that insubordination and disrespect for school officials will be rewarded by a system that has lost sight of the idea that the purpose of the juvenile court system is supposed to be rehabilitation.

NOTES:

United States v. Flatter

(9th Cir. 2006) 456 F. 3d 1154

SUBJECT: Pat Downs for Weapons

RULE: A pat down (or frisk) for weapons requires a reasonable suspicion that the person is armed and presently dangerous. Questioning a person about a mail theft in a small, crowded interview room is not, by itself, reasonable suspicion.

FACTS: Defendant was a postal employee working as a "tug" driver at a postal facility in Spokane, Washington. A "tug" is a motorized vehicle used to move large containers, or "crab pots," of packages around the facility and load them onto delivery trucks. The Veterans' Administration notified the Post Office that fourteen packages of medications, all of which passed through the Spokane facility, had turned up missing. Suspecting that the packages were being stolen by a postal employee, postal inspectors set up a sting operation. Six similarly-colored decoy packages were placed on top of two crab pots of packages that had already been sorted. Video cameras were set up to monitor the packages. Defendant was observed handling the mail in the crab pots, which he had no business doing, when he moved them onto a mail truck. After removing a package of the same color as the decoy packages from one of the crab pots, defendant disappeared from view into the truck. Shortly, thereafter, when he left the immediate area, the crab pots were checked. All of the decoys had been moved from where they were originally placed, and one was missing. Defendant was contacted by the postal inspectors in the employee break room. When his initial responses were found to be "evasive and unsatisfying," they asked him to accompany them to their office. Defendant agreed, so long as he could have a union representative present. Once in the postal inspectors' office, defendant was told that he was not under arrest, that he was free to leave, but that they were going to pat him down for weapons. The postal inspectors later testified that they had decided to pat defendant down for weapons because they were meeting in a small room where, with the presence of the union rep, it was a bit crowded, and that they were concerned that the situation might turn confrontational. While conducting the pat down, an envelope from the missing decoy was recovered from defendant's back pants pocket. Indicted on one count of mail theft (18 U.S.C. § 1709), defendant's motion to suppress the envelope was denied by the trial court. Convicted after a jury trial, defendant appealed.

HELD: The Ninth Circuit Court of Appeals reversed. Under the Fourth Amendment, a search of a person requires "*probable cause*" to believe that there is something there subject to being seized. An exception to this rule is when an officer can articulate a "reasonable belief" that a person may be armed and presently dangerous, in which case a pat down (or "*frisk*") of that person's outer clothing for the feel of any objects that could be a weapon is lawful. But this lower standard of proof—i.e., a "*reasonable suspicion*"—is allowed only so that an officer may protect himself. Among the factors to be considered in determining whether there exists sufficient reasonable suspicion to believe a person is armed include the nature of the crime. But mail theft is not a crime one might suspect to be associated with the need to carry a weapon. And conducting an interview of a theft suspect in a small room, while maybe justifying some safety concerns for the postal inspectors, is not a reason to suspect that defendant might be armed. And nothing else occurred in this case that might have suggested to the postal inspectors that defendant was actually armed. In fact, in testimony, one of the postal inspectors admitted that he "had no idea if (defendant) had weapons on him." There being no reasonable suspicion to believe that defendant was armed, therefore, patting him down, resulting in the discovery of the missing decoy package, was a violation of the Fourth Amendment.

NOTE: This case is no surprise. The law is quite clear that you can't pat someone down for weapons unless you are able to articulate some reason to believe that he may be armed. Just because you "felt it was prudent to insure that (a suspect) was not carrying any weapons," as one postal inspector testified in this case, is clearly not enough. Here's the rule: Absent an articulable reasonable suspicion to believe that your suspect may be armed with some type of weapon, you cannot legally conduct a pat down for weapons. The type of crime you are investigating, the threatening behavior of the defendant, your knowledge of the defendant's past crimes of violence or carrying weapons, bulges or clothing not hanging or moving naturally on the defendant are all factors that you are allowed to consider.

NOTES:

Attorney General Opinion No. 05-206

(2005) 88 Ops. Cal Atty. Gen. 196

SUBJECT: Arrest for non-Vehicle Code infraction

RULE: A peace officer *may* take a person into physical custody for a non-Vehicle Code infraction when that person is unable to provide satisfactory evidence of identification, even if the person is willing to sign a written promise to appear and provide a thumbprint.

FACTS: A member of the State Assembly asked the California Attorney General (Bill Lockyer) for his office's opinion as to whether a peace officer may take into physical custody an arrestee on a non-Vehicle Code infraction when the arrestee does not present satisfactory evidence of identification, even if the arrestee is willing to sign a promise to appear and provide a fingerprint for identification purposes.

HELD: The California Attorney General issued an opinion answering the above question in the affirmative. There are a number of infractions contained in the Penal Code. (See Pen. Code, § 640) The general rule is that a person arrested on an infraction must be cited and released at the scene, infractions being punishable by a fine only. "(A) peace officer shall only require the arrestee to present his or her driver's license or other satisfactory evidence of his or her identity for examination and to sign a written promise to appear . . . ." (Pen. Code, § 853.5.) The same Penal Code section, however, goes on to state that where the person is unable to show a driver's license or other satisfactory evidence of identification, the officer has the alternative of requiring the person to provide a print of his or her right thumb (or left thumb or other finger if the right one is missing or disfigured). However, the section specifically allows for such an alternative procedure at the officer's discretion. Therefore, with the section written in the disjunctive and indicating that the alternative of a thumbprint "*may*" be used, the Legislature obviously intended the following: An officer must accept a driver's license or other satisfactory evidence of identification and, upon the arrestee signing a written promise to appear, release the person cited. In those cases where the person is unable to provide such identification, the officer is given the discretion of either allowing the person to supply a thumbprint instead of identification or to simply take the person into physical custody. The fact that the arrestee is willing to sign a written promise to appear and provide a thumbprint does not mandate that the officer accept this alternative in place of satisfactory identification.

NOTE: The opinion does not discuss what constitutes "*satisfactory evidence of identification*" other than a driver's license. But the case law does: Identification documents that are an "*effective equivalent*" are *presumptively* (i.e., in the absence of contrary evidence) sufficient. This would include a California identity card (per Veh. Code, § 13000) or any current written identification which contains at a minimum a photograph and description of the person named on it, a current mailing address, a signature of the person, and a serial or other identifying number. (*People v. Monroe* (1993) 12 Cal.App.4th 1174, 1186.) Also, the officer is not legally obligated to make radio or other inquires in an attempt to verify the person's oral assertions of identity. (*Id*., at p. 1189; *People v. McKay* (2002) 27 Cal.4th 601, 619-625.) Note also, with similar language in the Vehicle Code (see Veh. Code, § 40303), there's no reason why this same opinion wouldn't hold true for a Vehicle Code infraction as well.

NOTES:

United States v. Thomas

(9th Cir. 2006) 447 F. 3d 1191

SUBJECT: Standing, and Rented Vehicles

RULE: A person who is not authorized under the terms of a rental agreement for a vehicle does *not* have standing to challenge the search of that vehicle absent evidence that he was at least driving it with the permission of an authorized renter.

FACTS: A confidential informant provided Michael Bahr, a Spokane, Washington, police officer and DEA task force officer, with information concerning defendant's on-going narcotics activity, transporting crack cocaine from Long Beach, California, to Spokane. The general scheme was for defendant to either rent a car in Spokane, or have someone rent it for him, and then drive to Long Beach to purchase the cocaine before transporting it back to Spokane. The informant had done this once with defendant several years earlier. Defendant continued to make similar trips every six to eight weeks. In November, 2002, the informant told Officer Bahr that defendant purchased cocaine for an individual that the officer knew had been arrested for distributing cocaine. The individual who rented the car for defendant was one of his known associates. In December, 2002, the informant told Bahr that defendant was preparing to again rent a car and make another trip, using that same associate to rent the vehicle for him. When it was determined where the associate intended to rent the car, arrangements were made with the rental agency to put a tracking device in it. When the car was rented in early March, the associate signed a document to the effect that no unauthorized persons were allowed to drive the car. Defendant was not listed as an authorized driver. On March 8, 2005, the tracking device alerted police that the rented car had returned to Washington State where waiting state troopers stopped it. Defendant was discovered to be the sole occupant of the car. He was arrested on an outstanding warrant and the car was searched, resulting in recovery of nearly 600 grams of cocaine, 25 grams of heroin and $1,200 in cash. Charged in federal court with a number of drug related charges, defendant made a motion to suppress the evidence recovered from the car. During the hearing on the motion, defendant failed to present any evidence concerning his authority to be driving the car. The trial court denied defendant's motion to suppress under a number of theories (see below), including that as an unauthorized driver of the vehicle, he lacked standing to challenge the legality of the search in the first place. Defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. Before a defendant can even litigate the lawfulness of a search, he must first establish that he has "standing;" i.e., a legitimate expectation of privacy in the place or thing being searched. Failing to do so deprives him of the right to challenge the searching officers' actions. After reviewing the law from other federal circuits on the issue of standing and rental vehicles, the Court ruled first that just because the defendant was not an authorized driver under the terms of the rental agreement did not deprive him of standing to challenge the legality of the search of the vehicle. Even if defendant was not an authorized driver, he still retained some degree of a privacy expectation in the vehicle. "It cannot be said that a defendant's privacy interest is dependent simply upon whether the defendant is in violation of the terms of his lease agreement." But as an unauthorized driver, defendant only has standing to challenge the search of a rental vehicle if he received permission to use the rental car from the authorized renter. Defendant, who had the burden of proof on this issue, failed to present any evidence of such permission. His motion to suppress the evidence seized from the vehicle, therefore, was properly denied.

NOTE: The trial court further upheld the installation of a tracking device in the car, the stop, and the search of the car, upon a number of theories; i.e., that the tracking device put on the rental vehicle was authorized by a search warrant supported by probable cause (as well as by the consent of the rental company), monitoring defendant's movements in public was not a search, a "*Terry* stop" was warranted under the circumstances, the "automobile exception" to the search warrant requirement to search the rental car applied, and that the discovery of the dope was inevitable in any event. Failing to establish his standing to litigate these issues, however, the Ninth Circuit didn't even get into them. But it was apparent that one way or the other, defendant was destined to lose this one.

NOTES:

United States v. Decoud

(9th Cir. 2006) 456 F. 3d 996

SUBJECT: Search and Seizure: Expectation of Privacy; Effect of Denying Ownership

RULE: A defendant's denial of ownership of a vehicle or its contents prevents him from challenging the legality of a search of that vehicle.

FACTS: Defendant was involved with a number of others in the manufacture and sale of crack cocaine in an organization led by a person named Page. Drug Enforcement Administration (DEA) agents began an investigation of Page's organization. Through the use of a federally authorized wiretap, Page was overheard in December, 2001, talking about defendant "cooking" a batch of cocaine base. DEA solicited the help of the California Highway Patrol (CHP), asking them to stop defendant's automobile if a legitimate, independent basis for doing so could be developed. A CHP officer traveling with a narcotics canine pulled defendant over soon thereafter for speeding and for having improperly tinted windows. During the stop, it was determined that defendant was driving on a suspended driver's license. Defendant was arrested and his car was impounded, pursuant to Vehicle Code section 22651, subdivision (p). The officer conducted an impound search of the vehicle and found a locked metal briefcase (along with a cooking pot, duct tape, sandwich-size plastic baggies, cellular telephones, and cash) in the trunk. When asked about the briefcase, defendant claimed that the car had been borrowed, that the briefcase belonged to the vehicle's owner, and that he didn't know how to open it. After the officer's canine alerted on the briefcase, it was forced open. The briefcase contained a large supply of cocaine base, a digital scale, and a loaded semi-automatic handgun. Defendant was charged by indictment in federal court with eleven other defendants (9 of whom pled out early) on a variety of drug-related offenses, including a conspiracy to distribute cocaine. Defendant was also charged with being a felon in possession of a firearm. After the trial court denied various motions to suppress, which challenged, among other things, the legality of the search of defendant's car, defendant was convicted and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed defendant's conviction. Defendant challenged the lawfulness of the inventory search of the vehicle, arguing that the search was not conducted in accordance with any standardized policy and was merely a ruse for a general rummaging to find incriminating evidence. The Court declined to consider this issue, noting that by denying ownership or any possessory interest in the vehicle or its contents, he gave up any expectation of privacy. Therefore, defendant deprived himself of any legal basis to challenge the search.

NOTE: The lawfulness of a properly trained dog's sniff in establishing probable cause is nothing new. The real value to this case is in shooting down the not uncommon argument that somehow we're violating someone's right to privacy by using an otherwise lawful stop to *merely inquire* into other possible criminality.

NOTES:

People v. Daggs

(2005) 133 Cal.App. 4th 361

SUBJECT: Container Searches; An abandoned Cell Phone

RULE: Leaving a cell phone at the scene of a crime makes that cell phone "*abandoned property*" despite the suspect's subjective wish to retrieve it, thus negating the suspect's expectation of privacy in the contents of that phone.

FACTS: Defendant grabbed several cartons of cigarettes from the shelves of a Walgreen's Drug Store and attempted to flee. When a clerk tried to stop him, defendant elevated his misdemeanor petty theft into a felony robbery by spraying the clerk in the face with pepper spray. Later, while celebrating how he had so cleverly gotten away with the crime of the century, this dimwit soon realized that he'd left his cell phone in the Walgreen's. The investigating officers found the cell phone and, when no one claimed it, impounded it. At the hearing on this motion, defendant testified that he accidentally lost the cell phone, had previously locked the phone to prevent anyone else from using it, and that he wanted to retrieve it but he didn't because he feared arrest. A week later, with the phone still unclaimed, a detective opened it and removed the battery, hoping to be able to determine who owned it. Using the cell phone's electronic serial number, hex number and decimal number (all visible within the phone after the battery had been removed), the detective obtained a search warrant for the phone's owner. This led him to defendant's brother who told police that he had given it to defendant, a fact verified by the defendant's mother. Defendant was thereafter arrested for robbery. He later brought a motion to suppress the cell phone information, arguing that the warrantless search of his cell phone was illegal. The trial court denied defendant's motion, ruling that defendant had abandoned the cell phone. Defendant appealed from his conviction for robbery.

HELD: The First District Court of Appeal (Div. 1) affirmed. The Court agreed with the trial court that by leaving the cell phone in Walgreen's and not reclaiming it, defendant had abandoned it. Whether or not property is abandoned is determined by evaluating the *objective* factors present under the circumstances. The defendant's *subjective* wish to retain possession or control over the cell phone, on which he failed to act, is irrelevant. By leaving the cell phone in the store and then failing to return for it, irrespective of his reasons, defendant abandoned any reasonable expectation of privacy in the cell phone. "Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." As abandoned property, therefore, defendant did not have standing to challenge the search of his cell phone.

NOTE: It is important to recognize that the courts treat cell phones like other containers, which require a search warrant to open, absent an exception.

NOTES:

United States v. Ziegler

(9th Cir. 2006) 456 F. 3d 1138

SUBJECT: Search and Seizure: Computer Searches in the Workplace; Expectation of Privacy

RULE: There is no reasonable expectation of privacy in the contents of a person's company computer which is knowingly monitored by the company.

FACTS: The FBI received a tip from an employee of Frontline Processing, a business which serviced internet merchants by processing on-line electronic payments, that another employee had accessed child-pornography from a workplace computer. FBI Special Agent James Kennedy contacted Frontline's Internet Technology Administrator, John Softich. Softich told Kennedy that the company had in place a firewall, which permitted constant monitoring of the employees' internet activities. Through such monitoring, Softich was aware that defendant, Frontline's Director of Operations, had accessed child pornography via the internet using a company computer. Frontline owned and routinely monitored all workplace computers; a fact of which employees were aware. Softich had already placed a monitor on defendant's computer to record its internet traffic by copying its cache files. Agent Kennedy therefore instructed Softich to make a copy of defendant's hard drive because he feared it might be tampered with before the FBI could make an arrest. (Kennedy testified that Frontline had already done this. However, without expressing any opinion as to Kennedy's credibility, and for the sake of argument, the Court assumed that Softich did this at Kennedy's direction and that Softich was thus acting as an agent of law enforcement.) Softich did this by going into defendant's office, using a key he obtained from Frontline's Chief Financial Officer; opening the outer casing of defendant's computer; and making two copies of the hard drive. The Frontline administration further cooperated by later voluntarily turning over defendant's computer and the copies it had made of the hard drive to the FBI, giving them permission to search the computer without a search warrant. A forensic examination of the computer discovered many images of child pornography. Defendant was later indicted by a federal grand jury with various charges related to the receipt and possession of child pornography. The federal district court denied defendant's motion to suppress the recovered child pornography, ruling that defendant did not have a reasonable expectation of privacy in the contents of his computer and, as such, could not challenge the legality of the search of the computer. Defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The Government did not dispute that defendant had a "*subjective*" expectation (i.e. in his own mind) of privacy in his company computer. The question is whether that expectation of privacy was also "*objectively reasonable*" (i.e. as viewed by a reasonable person). The Court agreed with the trial court in ruling that defendant's expectation of privacy, under the facts of this case, was not *objectively reasonable*. It is possible that a person's expectation of privacy can be objectively reasonable when we're talking about private papers or effects in a desk drawer or a file cabinet. (See *O'Connor v. Ortega* (1987) 480 U.S. 709; *Schowengerdt v. General Dynamics Corp.* (9th Cir. 1987) 823 F.2d 1328, 1335.) And the Court recognized that people tend to keep some of their most private information in their computers. But under the facts of this case, the computer belonged to the company. By policy, the right of employees to use the company computers for private use was restricted. Employees were put on notice that the company retained the right to "complete administrative access to anybody's machine." Employees also knew that the company had installed a firewall comprised of "a program that

monitors [i]nternet traffic . . . from within the organization to make sure nobody is visiting any sites that might be unprofessional." Therefore, these factors, and particularly Frontline's policy of routine monitoring, had the legal effect of negating an employee's right to argue that any expectation of privacy he or she might have had in the contents of the computer was objectively reasonable.

NOTE: Defendant also argued that the entry into his office to get to the computer was a violation of his right to privacy. The Court relegated this argument to a mere footnote (fn. 9), noting that defendant's office wasn't searched; only his computer. Although they had to get into his office to get to his computer, going through the office was no more than an "operational realit[y] of [defendant's] workplace [that] diminished his legitimate privacy expectations." In other words, because he can't complain about them searching his computer, he also can't complain that they had to get into his office to do that.

NOTES:

United States v. Grubbs

(2006) 126 S.Ct. 1494

SUBJECT: Search Warrants: The Anticipatory Search Warrant

RULE: (1) Anticipatory search warrants are constitutional. (2) Failing to describe the triggering event in an anticipatory search warrant on the face of the warrant, or in a document incorporated into the warrant, is not a constitutional violation. (3) Failing to provide the property owner with a copy of a warrant prior to searching is not a constitutional violation.

FACTS: Defendant ordered and paid for a videotape over the Internet; the tape being advertised as depicting child pornography. The order, however, was intercepted by U.S. Postal Inspectors. Based upon the order, Postal Inspectors sought and obtained an "*anticipatory search warrant*" from a federal magistrate specifying, in the warrant affidavit, that the warrant was not valid until the videotape was delivered to defendant's house. However, there was nothing about the "*triggering event*" (i.e., delivery of the videotape) on the face of the warrant, and the warrant affidavit (in which the triggering event was described) was not specifically incorporated into the warrant. The 25-page affidavit had two attachments of its own; "A" being a description of the premises to be searched (i.e., defendant's home), and "B," the property to be seized (i.e., the videotape and other related items). Both of these attachments were incorporated into the warrant even thought the affidavit was not. The videotape was delivered to the house by an agent posing as a mail carrier. Ten officers and inspectors then descended upon defendant's home and searched it pursuant to the warrant. A copy of the search warrant and the attachments "A" and "B" were given to defendant. However, he was never given, or even shown, a copy of the affidavit where the triggering event was described. The videotape along with some other child pornography was seized. Defendant also made some admissions. He was arrested. After denial of his motion to suppress the evidence, defendant pled guilty and appealed. The Ninth Circuit Court of Appeals reversed, finding that failure to provide a suspect with notice of the "triggering event" in an anticipatory search warrant was a Fourth Amendment violation. (See 377 F.3d 1072 [as amended at 389 F.3d 1306].) The Government petitioned to the U.S. Supreme Court.

HELD: The United States Supreme Court reversed the Ninth Circuit, reinstating defendant's conviction. The Court first ruled that anticipatory search warrants are lawful. The Fourth Amendment does not require that there be probable cause to believe seizeable evidence is present at a particular location at the time a warrant is *issued*, but rather at the time the warrant is *executed*. To be constitutional under the Fourth Amendment's requirement that there be "*probable cause*," it is only necessary to prove the existence of *two* prerequisites of probability: (1) That there is probable cause (i.e., a "*fair probability*") that contraband or evidence of a crime will be found in a particular place; *and* (2) that there is probable cause to believe the triggering condition (e.g., the delivery of the contraband or evidence to the place to be searched) will in fact occur. In this case, it was known that the child pornography was to be delivered to defendant's house. The possibility that defendant might refuse such delivery did not detract from the probability that he would not, having ordered it himself. An anticipatory search warrant in these circumstances is lawful. Where the Ninth Circuit was mistaken was in their belief that the Fourth Amendment's "*particularity requirement*" includes the description of the triggering event in an anticipatory search warrant. *It does not*. Under the terms of the Fourth Amendment, only two matters must be "*particularly described*" in the warrant: (1) The place to be searched and (2) the persons or things to be seized. It is not a constitutional requirement that the triggering event be described in the warrant itself (either on its face or as included in an affidavit and incorporated into the warrant). Secondly, the Ninth Circuit's argument that the description of the triggering event must be

provided to the person whose property is being searched assumes that the executing officer must present the property-owner with a copy of the warrant before conducting his search. *He does not*. "The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante* (i.e., before) the 'deliberate, impartial judgment of a judicial officer . . . between the citizen and the police,' and by providing, *ex post* (after) a right to suppress evidence improperly obtained and a cause of action for damages." The person whose property is being searched, therefore, is not entitled to any pre-search notice of the triggering conditions in an anticipatory search warrant.

NOTES:

People v. Balint

(2006) 138 Cal.App.4th 200

SUBJECT: Search Warrants; Computers as Dominion and Control Evidence

RULE: An open and running laptop computer, found during the execution of a theft-related search warrant, may be seized as a possible container of dominion and control evidence even if not specifically listed in the warrant.

FACTS: Victim Erin Fouche lost her Compaq laptop computer in a car burglary on October 30, 2002. Five days later, Michael Maydon was arrested for failing to pay a motel room bill. Three stolen credit cards, taken along with some other items in another theft a week earlier, were found in Maydon's possession when arrested. The credit card theft victim in fact knew Maydon and knew that he lived with another thief by the name of John Stephens. On November 25 (almost a month after Fouche's laptop was taken), Anaheim detectives executed a search warrant on Maydon and Stephens' residence looking for other items related to the credit card theft. In plain view, sitting on a sofa in the family room, open and turned on, was a Compaq laptop computer. Although not listed in the warrant, the laptop was seized and impounded. After being arrested, Stephens claimed that the laptop belonged to defendant who also lived with them. In fact, defendant called the Anaheim Police Department claiming that the laptop was hers, asking whether she was going to be arrested. She claimed to have purchased the laptop from someone for $200, but admitted that she knew it was possibly stolen property. A second search warrant was later obtained to get into the Compaq laptop's computerized files, resulting in discovery that it belonged to Erin Fouche; the vehicle burglary victim. Charged with possession of stolen property, defendant brought a motion to suppress the laptop, arguing that because it was not listed in the warrant as property to be seized, it had been taken illegally by the police. The trial court denied defendant's motion, noting that the computer was subject to being seized as something that might contain evidence of "dominion and control" over the premises searched. Defendant was thereafter convicted by a jury and appealed.

HELD: The Fourth District Court of Appeal (Div. 3) affirmed. The search warrant executed at the house contained a standard, appellate-court approved, description of "dominion and control" evidence as items for which the officers had a right to search and seize. The seizure of "articles of personal property tending to establish the identity of persons in control of the premises" has been upheld as lawful. Although a laptop computer was not specifically listed, officers cannot be expected to predict before a search the types of containers in which identity information will be found. It is reasonable to assume that a computer, particularly when standing open and turned on, will likely provide some indication of who is responsible for the premises. Therefore, the Court concluded that the open laptop computer at issue here, because it qualifies as an electronic container capable of storing data similar in kind to the documents stored in any ordinary filing cabinet, was subject to seizure under the terms of the warrant at issue here. Seizing and later searching (under a second warrant) the laptop, therefore, was lawful.

NOTE: The Court notes several times how this laptop was open, in the family room, and turned on. But it never specifically says that the theory of this case is limited to such circumstances, and in fact cites a whole bunch of other cases from various jurisdictions allowing for the seizure of computers as containers of dominion and control evidence under a variety of circumstances. But it is just easier if officers remember to include in their warrants a request for a magistrate's authorization to seize and search computers for not only dominion and control evidence, but also for substantive evidence of the suspect's criminal acts that led

to the warrant in the first place. There may not be many crimes in today's high tech society which wouldn't provide some basis for arguing that there is some likelihood of finding evidence of a suspect's criminal acts documented on the home computers that everyone, including crooks, now have. Always remember to include a request for authorization to seize, transport, and submit the computer to a computer expert for a detailed search under conditions where evidence will not be destroyed.

NOTES:

People v. Murphy

(2005) 37 Cal.4th 490

SUBJECT: Knock and Notice & Exigent Circumstances

RULE: A contemporaneous drug transaction and a commotion occurring outside a residence, under circumstances where it is reasonable to believe the occupants of the residence have been forewarned of law enforcement's approach, constitutes a reasonable suspicion to believe there is more contraband in the residence and that such contraband will be destroyed unless an immediate entry is made.

FACTS: San Diego Sheriff's Narcotics Detective Alberto Santana knew defendant was on probation with search and seizure conditions. 2001, Santana saw a woman leaving defendant's home. The woman was stopped and admitted to having just purchased methamphetamine from defendant. Santana therefore decided to conduct a probation search on defendant and her residence. While Santana made preparations for the search, Detective John Marlow, surveilling defendant's home, observed an apparent narcotics transaction take place between defendant and a Hispanic male. Wearing raid clothing that conspicuously identified them as narcotics officers, a half dozen or more deputies approached the house. As they did so, they encountered a man at the side of the garage who appeared to be holding something in his hand. With guns drawn, the deputies "almost yell(ed)," that they were "Sheriffs," that they were conducting a probation search, and to get down on the ground. The man complied. It was noticed that a side window was open and their yelling caused a dog inside to start barking. Within the next five to seven seconds, four or five deputies entered the house and fanned out while verbally announcing their presence. No "*knock and notice*" compliance was attempted at the door because they believed that the occupants would have already heard them coming and that someone might now being arming him or herself, destroying evidence, or fleeing. Defendant, who later claimed she never heard them coming, was found in the opposite end of the house. Six baggies of methamphetamine and a scale were recovered. A later motion to suppress this evidence was denied, the trial judge ruling that although there were no exigent circumstances justifying non-compliance with the knock and notice requirements of Penal Code section 844, the officers yelling at the person outside constituted "*substantial compliance*." Defendant thereafter pled guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and appealed. The Fourth District Court of Appeal, in a split two-to-one decision, reversed. However, the California Supreme Court reversed the Court of Appeal, ordering the Court to reconsider its ruling in light of the intervening U.S. Supreme Court case of *United States v. Banks* (2003) 540 U.S. 31. The Fourth District Court of Appeal, in a second split decision, *again* found the entry to be illegal. The People petitioned to the California Supreme Court for a second time.

HELD: The California Supreme Court, in a 4 to 3 split decision, *again* reversed the District Court of Appeal. Ignoring the issue of whether there was "*substantial compliance*" with the knock and notice requirements (the AG having abandoned that theory), the Court, following the U.S. Supreme Court's lead in *United States v. Banks*, ruled that "*exigent circumstances*" justified the officers' immediate entry. The test for allowing a "*no-knock*" entry is that the police must have a "*reasonable suspicion*" that knocking and announcing their presence, under the particular circumstances, would (1) be dangerous or futile, *or* (2) would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence. The knock and notice requirements of Penal Code section 844 are excused where "the specific facts known to the officer before his entry are sufficient to support his good faith belief that compliance will increase his peril, frustrate the

arrest, or permit the destruction of evidence." The same rule applies whether the officers have knocked and then decide to make an immediate entry based upon what happens in response to the knock, or a no-knock entry is made. In *Banks*, the Court noted that the issue in a case such as this is the possible "*imminent disposal*" of contraband and not the time it might take for an occupant to get to the front door to open it. Where, as in this case, there is a contemporaneous sale of narcotics on the premises, coupled with the officers' yelling at a suspect outside an open window, it is reasonable to assume that compliance with the knock and notice requirements of Penal Code section 844 (or Pen. Code, § 1534 in executing a search warrant) will risk the destruction of more contraband inside the house. The deputies could reasonably assume (1) that more contraband will be found in the house and (2) that, given the commotion, the occupants of the house would be aware of the deputies' presence and will destroy any remaining contraband. As such, the deputies' failure to comply with the statutory knock and notice requirements was reasonable. The entry under these circumstances, therefore, was lawful.

NOTE: The Court cites with approval Justice Patricia Benke's dissenting opinions in the two Fourth District reversals where she basically says that the deputies in this case really had no choice, given the loud commotion that occurred outside before they could even get to the door. But note the Supreme Court's cautioning that they are *not* endorsing the intentional manufacturing of an exigency by purposely making a lot of noise outside. "(P)olice officers are not permitted to contrive to create their own exigency by making loud noises before entering, or even by loudly announcing their presence and purpose to serve as a pretext for entering without knocking." So expect inventive defense attorneys to argue that that is exactly what you did. Your lack of control over whatever it is that generates the need to skip knock and notice compliance *must* be noted in your reports and your testimony. The dissent in this case criticizes the lack of any specific information known to the officers justifying a belief that evidence would be destroyed, other than the fact that the occupants probably knew that officers were coming. This is not a totally specious argument, except that it flies in the face of *United States v. Banks*. These cases appear to recognize that that under *certain circumstances*, it is logical (and lawful) to *assume* that evidence will be destroyed. And when that evidence is something like drugs, it can be destroyed in a matter of seconds. One of those "*certain circumstances*" would be when it is known that a drug deal had just been consummated on the premises and the occupants of the house have been forewarned that law enforcement is coming to get them.

NOTES:

Hudson v. Michigan

(2006) 126 S.Ct. 2159

SUBJECT: Knock and Notice and the Exclusionary Rule

RULE: When serving a lawful search warrant, the suppression of evidence is not a proper remedy for a "*knock and announce*" violation.

FACTS: Michigan police officers obtained a search warrant for Booker Hudson's residence, authorizing them to search for drugs and firearms. (The legality of the warrant was not in issue.) The officers knocked and announced their presence at defendant's front door before making an almost immediate (3 to 5 seconds) entry; an occurrence later conceded to be a violation of the "*knock and announce*" (or, as referred to in California, "*knock and notice*") rules. In the resulting search, an unlawful gun and "large quantities of drugs," including some rock cocaine, were recovered. Defendant's motion to suppress these items as the product of a "*knock and announce*" violation was granted by the trial court. On appeal to Michigan's intermediate appellate court, the trial court's ruling on this issue was reversed, the Court holding that suppression of evidence is not the appropriate remedy for a knock and announce violation when serving an otherwise lawful search warrant. This issue was eventually appealed to the United States Supreme Court.

HELD: The United States Supreme Court, in a spit 5-to-4 decision, affirmed, ruling that the evidence *should not* have been suppressed. In a protracted discussion of the history of the "*knock and announce*" rule, the Court first noted that compliance with the knock and announce requirements (i.e., knocking, identifying oneself as a law enforcement officer, stating the officer's purpose, and demanding entry) before entering a residence is the subject of both state (E.g., see California's Pen. Code, §§ 844, 1531) and federal (18 U.S.C. § 3109) statutes. It is also required in most cases by the Fourth Amendment." (*Wilson v. Arkansas* (1995) 514 U.S. 927.) But the Court also recognized that there are difficulties inherent in the use of this rule. For instance, how long officers must wait before it is reasonable to assume they are being denied entry, justifying a forced entry, and under what other "*exigent circumstances*" an immediate entry is lawful, has been the subject of much debate. Also, the Court further noted that the suppression of evidence is not always an appropriate remedy even when the Constitution has been violated, and should be done only as a last resort. Whether or not the Exclusionary Rule is appropriate in a particular circumstance is determined by balancing the costs to society that suppression entails (i.e., letting guilty people go free) with the need to deter unlawful police conduct. With these ideals in mind, the Court noted that the officers in this case had a legal right to search the defendant's home as authorized by a search warrant. Had they conducted the search without a judicially approved search warrant, the Exclusionary Rule would have been the appropriate remedy for such unlawful conduct. Compliance with knock and announce rules, however, is of lesser importance. In considering the costs to society by suppressing the evidence when the lawfulness of the entry (as opposed to the lawfulness of the search) is the issue, the Court ruled that suppressing the gun and drugs is *not* necessary in order to deter unlawful police conduct. Other remedies are available: E.g., suing the officers civilly and/or imposing internal police discipline. Because civil suits are a more viable alternative than they once were, and because law enforcement officers today are better educated, trained and supervised than they might have been when the Exclusionary Rule was first developed (i.e., 1914; *Weeks v. United States*, 232 U.S. 383.), penalizing the Government by suppressing evidence for merely entering a residence in violation of the knock and announce rules is not necessary, and therefore not an appropriate remedy.

NOTE: Contrary to much of the information already being circulated about this case, PURPOSELY VIOLATING KNOCK AND NOTICE IS NOT AN APPROPRIATE LAW ENFORCEMENT TACTIC. *DON'T DO IT*!!! All this case did was eliminate the suppression of evidence as a remedy for a knock and notice

violation. It does not eliminate the legal requirement that officers comply with the traditional knock and notice rules. It is still contrary to state and federal statutes, the California Constitution, *and* the Fourth Amendment to the United States Constitution, to ignore knock and notice. Violating knock and notice might not compromise the resulting criminal case, but *will* expose you to civil liability as well as departmental discipline. So as far as you (the cop) are concerned, *nothing has changed*. As far as the prosecutor is concerned, we can now save cases that otherwise would have been lost due to a knock and notice violation. The Court has paid law enforcement a great compliment in this case by noting how much more professional and ethical police officers are today than they were when the Exclusionary Rule was first adopted. Don't violate this trust by regressing now.

NOTES:

In re Frank S.

(2006) 142 Cal.App.4th 145

SUBJECT: Knock and Notice, per Penal Code section 844

RULE: A knock and notice (per Pen. Code, § 844) violation in the making of a warrantless, but otherwise lawful, arrest, does not require the suppression of evidence recovered from the arrestee's person.

FACTS: Officer Don Pearman of the Pittsburg, California, Police Department, observed defendant minor walking with companions in a neighborhood known for having a high rate of drug-related activity. Officer Pearman knew defendant from prior contacts, knew that he was on parole, and knew that a condition of his parole was that he wasn't supposed to be in that area. Officer Pearman had warned defendant before that he might be arrested if caught there. Defendant displayed his knowledge that he was in trouble by trying to conceal himself from the officer by hiding behind one of his companions. The officer held off making contact until he could call for assistance because he knew defendant had a tendency to run when contacted by the police. As he called for assistance, Officer Pearman watched defendant walk down a driveway to a friend's house. After other officers arrived, they walked to the side of the house, stopping at a sliding glass door. From that location, Officer Pearman could hear "a bunch of commotion" coming from inside. Reaching through an opening in the doorway, Officer Pearman pulled a curtain aside. From that vantage point he could see defendant sitting on a couch about three feet away. Officer Pearman walked inside and arrested defendant. He patting him down for weapons and then, because other occupants were becoming agitated, escorted him outside. Later at the station, a more thorough search was done of defendant's person. A zip-lock baggie containing some loose marijuana and a sandwich bag containing 31 smaller bags of marijuana were recovered from his jacket. Defendant was charged by petition in Juvenile Court with possession of marijuana for sale. The Juvenile Court judge didn't buy his claim that the jacket was his brother's, and that he didn't know what was in it. The petition was sustained and defendant was committed to the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (formerly, the California Youth Authority). Defendant appealed.

HELD: The First District Court of Appeal affirmed. Defendant argued that his trial counsel was "ineffective" for having failed to make a motion to suppress the marijuana. Specifically, defendant contended that Officer Pearman violated California's "knock and notice" requirements, as described in Penal Code section 844, and that that violation required the suppression of the evidence subsequently recovered from defendant. Section 844 specifically states that a peace officer may enter a house to make an arrest only "after having demanded admittance and (after he has) explained the purpose for which admittance is desired." The Common Law "knock and announce" rule, from which Penal Code section 844 is derived, "forms part of the reasonableness inquire under the Fourth Amendment." The People conceded that Officer Pearman failed to comply with the requirements of Penal Code section 844. However, The United States Supreme Court has recently ruled that the suppression of evidence is not an appropriate sanction for violating the knock and notice rules. (*Hudson v. Michigan* (2006) 126 S.Ct. 2159.) Per *Hudson*, the suppression of evidence is only necessary where the interests protected by the constitutional guarantee that has been violated would be served by suppressing the evidence thus obtained. The interests protected by the knock and notice rules include human life, because "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Property rights are also protected by providing residents an opportunity to prevent a forcible entry. And, "privacy and dignity" are protected by giving the occupants an opportunity to collect themselves before answering the door. What the knock and notice rules *do not* protect, however, is one's interest in preventing the government from seeing or taking evidence described in a search warrant (as in *Hudson*), nor the arrest of an individual for whom there is probable cause to arrest

(as in this case). The rule as dictated by *Hudson* (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest case. Therefore, defendant's counsel was not incompetent for having failed to make a motion to suppress the evidence in this case in that he would have lost that motion even if made.

NOTE: Despite the ruling in this case, there is still the possibility that Officer Pearman may be subject to civil liability in a suit filed by the owner of the house he entered. (See *Steagald v. United States* (1981) 451 U.S. 204.)

NOTES:

Hart v. Parks

(9th Cir. 2006) 450 F. 3d 1059

SUBJECT: Arrests: Probable Cause to Arrest and Ramey/Payton

RULE: *Peyton*/*Ramey* is not violated by asking a criminal suspect to come out of his house. Probable cause justifying an arrest exists when the "*cumulative information*" establishes a "*fair probability*" of the arrestee's guilt.

FACTS: On March 13, 2000, a 500-pound pallet of Academy Award Oscar statuettes ("Oscars") were reported missing and possibly stolen. Two experienced Los Angeles Police Department detectives were assigned to investigate. It was quickly determined that the Oscars likely disappeared from the facilities of the company hired to ship them to the Academy of Motion Picture Arts and Sciences; *Roadway Express Shipping*. It was further determined that the Oscars would have had to have been taken from Roadway's Los Angeles loading docks between 3:01 am and 8:00 am on March 8, and that such a heist would have necessarily involved at least two people; a forklift operator and a truck driver. Interviews with various employees resulted in Anthony Hart (plaintiff in this civil suit; defendant in the criminal case), a Roadway forklift operator, being identified by a couple of people as a possible suspect in that he was a "known thief." Hart was interviewed, but refused to discuss the missing Oscars, saying he "was not a snitch." The next day, a $25,000 reward for information was offered to Roadway employees in a meeting where Hart was present. Information about the reward was not publicly announced. This prompted an anonymous telephone call to Roadway's security chief identifying Hart as the thief. Also, an individual named Daniel Pearson (apparently an attorney) called and indicated that he had been retained by an individual who wanted to turn in the Oscars and claim the $25,000 reward. A surveillance was immediately initiated on Pearson and he was followed while going to Hart's residence. A few days later, the reward was upped to $50,000 and again offered to Roadway employees without any public announcement. This resulted in a different anonymous caller identifying Hart as being involved in the theft. Also, within 30 minutes after this reward was offered, Pearson called again seeking the reward for his still-unidentified client. In this call, Pearson indicated that "they" had the Oscars, and that he would deliver them to an undisclosed location in exchange for the reward money. A third anonymous caller indicated that he had personally seen Hart load the Oscars into a truck driven by an employee named Larry. A check of company records corroborated the fact that both Hart and a truck driver named Larry Ledent were working on the morning of the theft. It was also learned that both Hart and Ledent had prior criminal histories for theft. Armed with this information, the detectives went to Hart's house. He complied when asked to step out of his house and answer some questions, but he refused to give the detectives permission to search his home. He was therefore arrested and taken to the police station for further questioning. Larry Ledent was arrested later that day and, when questioned, confessed that he and Hart had in fact stolen the Oscars. The missing Oscars were subsequently recovered (although we're not told how or where). The Los Angeles District Attorney rejected the case on Hart citing a lack of sufficient admissible evidence. Over the next five months, additional evidence was collected connecting Hart with at least two of the stolen Oscars, leading to a grand jury indictment charging him with theft. He was rearrested on an arrest warrant stemming from the indictment. He later pled "no contest" to one count of receiving stolen property and was sentenced to probation. Hart then filed this federal civil rights suit alleging that he had been illegally arrested. When the federal district court eventually granted the civil defendants' (i.e., police officers, etc.) motion for summary judgment (dismissing the lawsuit), Hart appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. Hart first argued that the detectives had violated *Payton v. New York* (1980) 445 U.S. 573 (known as a "*Ramey*" violation, per *People v. Ramey* (1976) 16 Cal.3d 263, in state practice), when they arrested him without a warrant in the first arrest at his home. Hart cited a prior case (i.e., *United States v Al-Azzaway* (9th Cir. 1985) 784 F.2d 890.) where it was held that *Payton* was violated when officers ordered a defendant out of his house at gunpoint. The Court rejected this argument in that in this case, Hart was merely asked to step outside to talk. Without any evidence to the effect that he was somehow "*coerced*" into coming out, *Payton* (and *Ramey*) was not violated. Hart further argued that he was arrested without probable cause when he was taken to the police station for questioning. "*Probable cause*" merely requires that "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense. . . . Police must only show that, under the totality of the circumstances, . . . a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." The Court concluded here that the detectives had "*substantial evidence*" that Hart was involved in the theft of the Oscars when they arrested him at his house. For instance, the detectives knew that Hart was working at the time of the theft. It was known that a forklift would have had to have been used to take the 500-pound pallet of statuettes, and that Hart was a forklift operator. It was further known that both Hart and the co-suspect (Ledent) had criminal records for theft. The detectives were aware that Pearson claimed to know who had the Oscars, and where they were located, indicating at least some association with the thief. Pearson's acquaintanceship with Hart had been established by the time the arrest was made. (It was later discovered that they were in fact brothers-in-law.) Lastly, three separate anonymous calls had been received, each connecting Hart with the theft. Together, this was more than enough information upon which to base an arrest. The fact that a lot of the information the detectives had was "hearsay" and other inadmissible information is irrelevant. Also, the fact that the information available to police officers "gave rise to a variety of 'inferences,' some of which support Hart's innocence," is also irrelevant. "(O)fficers may 'draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." Similarly, the fact that if viewed in isolation, any single fact, independently, might not be enough to establish probable cause is unimportant. Probable cause is a determination made based upon "*cumulative information*" (more often referred to as the "*totality of the circumstances*"). Because this arrest was lawful, his second arrest, based upon all the above plus the results of some further investigation by the detectives resulting in Hart being indicted by a grand jury, was also lawful. The trial court, therefore, was correct in granting the civil defendant's motion for summary judgment.

NOTE: Simply asking a defendant to step out of his/her home to talk is not a Peyton/Ramey violation. There was not any behavior that "coerced" the defendant from the house, like pointing guns and ordering him out. This decision also provides a thorough discussion of what it takes to establish probable cause, the detectives doing an excellent job of putting together, piece by piece, a whole bunch of circumstantial evidence.

NOTES:

Georgia v. Randolph

(2006) 126 S.Ct. 1515

SUBJECT: Consent to Search, When a Co-Tenant Objects

RULE: When two equally situated cotenants are asked for consent to enter and/or search a residence, both present at the scene, with one saying "*yes*" but the other saying "*no*," entry and/or search is illegal absent an exigent circumstance or a search warrant.

FACTS: Scott (defendant) and Janet Randolph lived as husband and wife in Americus, Georgia. In May, 2001, the couple separated with Janet fleeing to her parents' house in Canada. She returned two weeks later, however, and the hostilities began anew. On July 6, Janet called police complaining that defendant had taken and hidden their child. Responding police found both Janet and defendant at the house. After the police retrieved the child from a neighbor, Janet further complained that defendant was a cocaine user and had evidence of that usage in the house. Defendant declined to give the officers permission to enter the house, but Janet did. She took the officers upstairs to defendant's bedroom and showed them some paraphernalia and a white power alleged to be cocaine. The police called the district attorney who advised them to get a search warrant. That was done and more evidence of drug usage was seized. Charged by indictment in state court with possession of cocaine, defendant's motion to suppress his cocaine was denied. A Georgia appellate court reversed, finding that even though the police had Janet's consent, the initial entry and search done over defendant's objection was illegal. The Georgia Supreme Court affirmed. The State petitioned to the United States Supreme Court.

HELD: The United States Supreme Court, in a five-to-three decision, affirmed the Georgia Supreme Court, holding that under the circumstances, the entry and resulting search of defendant's home was illegal as to him. The issue in this case is whether law enforcement officers may make a warrantless entry into a residence based upon the consent of one cotenant when a second cotenant, present at the scene and with common authority over the premises, objects. The Court recognized that most lower courts (state and federal, including California) have ruled that officers may ignore the "no," and go with the "yes." But, per the Court majority, to do so is a violation of the objecting cotenant's Fourth Amendment rights. The issue of one's "*reasonable expectation of privacy*" under the Fourth Amendment must take into consideration "*widely shared social expectations*." For instance, when a person asks two equally situated cotenants for permission to enter their mutual residence, getting permission from only one of them while the other is saying "no," the "*social expectation*" is that the person seeking to make entry would not feel like he or she is welcome inside. Therefore, in such a situation, with one cotenant objecting, a law enforcement officer must be able to either articulate exigent circumstances justifying the entry or obtain a search warrant. Because the officers failed to do so in this case, the evidence retrieved from within the house should have been suppressed.

NOTE: The dissenting justices argue, in a long decision laced with any number of "what ifs," that the "*widely shared social expectation*" is not necessarily as described by the majority opinion. It depends upon the circumstances of the confrontation, including the inter-relationships of the persons involved. Also, the minority argues that while social expectations may guide the determination of what constitutes a "*reasonable expectation of privacy*," they should not control the issue of consent. Living with a cotenant necessarily involves the surrendering of one's privacy expectations, at least to some degree. By having a cotenant, a person "*assumes the risk*" that the cotenant may compromise his privacy; a factor that diminishes an otherwise reasonable expectation of privacy. It is *not* reasonable to expect that a cotenant with equal authority over a place (such as a home) will not grant others permission to enter that place and

observe items not otherwise made public. However, the majority opinion holds that when two equally situated cotenants are at the residence and, in response to law enforcement's request to enter and/or search, where one cotenant says "*yes*," and the other says "*no*," *you may not make entry* absent exigent circumstances or a search warrant. Note also, however, what this case *does not* forbid, as specifically stated in the majority opinion:

- Where there is a "*recognized hierarchy*" (e.g., parent vs. child), objections from the one with the inferior status may be ignored.
- With a reasonable (articulable) fear for the safety of the person inviting officers inside, or the safety of anyone else inside (e.g., see *U.S. v. Russell*, below), entry may be made to check the victim's welfare and/or to stop pending violence.
- An objection from an *absent cotenant* (even if handcuffed and in a patrol car immediately out front) may be ignored, at least so long as he or she is not led away from the scene for the purpose of justifying an entry into the residence.
- It is not necessary to solicit possible objections from a cotenant, even if that person is inside and/or available, and even if it is expected that that person would object.
- Any other exigent circumstance (safety of the occupants, preservation of possible physical evidence, etc.) may justify an immediate entry, at least until the scene is secured and/or the suspects detained pending the obtaining of a search warrant.
- Entering with the victim of domestic violence, at her request, for the purpose of protecting her as she collects her belongings, is lawful.
- The consenting cotenant may retrieve evidence and bring it out to the police.
- With probable cause, a search warrant may be obtained for the search of the residence.

NOTES:

United States v. Ruiz

(9th Cir. 2005) 428 F. 3d 877

SUBJECT: Third Party Consent to Search; Apparent Authority

RULE: A consent to search obtained from a person with the apparent authority to give such consent is valid.

FACTS: Portland police officers accompanied a parole officer to do a check on a parolee, Bruce Lagrew, who was rumored to be in possession of a firearm. Charles Boswell, a resident of the trailer where Lagrew was believed to be living and the parolee's uncle, answered the door. Defendant (who was not the parolee they were looking for) was in the front room sleeping on a pullout bed. Boswell consented to allowing the officers in to check for Lagrew. While the parole officer was doing that, the officers talked with defendant who admitted to being a felon, having just completed his parole. Next to defendant, on a shelf, was a gun case. When Boswell and the parole officer returned to the front room, Boswell was asked if there was a gun in the gun case. He responded that he did not know. When asked if the officers could check it, Boswell said, "*sure*." Defendant (apparently) said nothing. Inside the gun case was found a .22 caliber semiautomatic handgun. Another officer, concerned that defendant was a felon in close proximity to this gun, asked if the jacket hanging near him was his. Defendant said that it was, and then consented to the officer's request to search it: "*Yeah, it's my jacket, Go ahead*." A speed loader containing ammunition for a .38 caliber revolver was found in the jacket. Defendant was arrested (felon in possession of ammunition?) and searched incident to the arrest. A .38 caliber pistol was found under the pillow on the bed where he had been sleeping. Defendant was charged in federal court with being a felon in possession of both pistols. His motion to suppress, arguing that the gun case was illegally searched, was denied. Defendant pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals affirmed. The Government's theory justifying the warrantless search of the gun case was that Boswell, although later discovered not to be the owner of the gun case, had at the very least the "*apparent authority*" to give the officers consent. There was no evidence in this case that defendant gave Boswell the actual, express authority to consent to a search of his gun case. However, officers are also acting lawfully when the one who gives consent has the "*apparent authority*" to do so. Apparent authority will be found where three elements are met. *First*, the searching officer(s) must believe some untrue fact that was then used to assess the extent of the consent-giver's control over the area searched. Here, the officers assumed that Boswell, as a resident of the house, had at least joint control over the gun case that was sitting out in plain view. From this, the officers assumed that Boswell could consent to the search of the gun case. *Secondly*, it must be objectively reasonable for the officer to believe the untrue fact (i.e., that Boswell had at least joint control over the gun case). Boswell acted as if he had such control. Nothing occurred that would have led the officers to believe otherwise. *Third*, the untrue fact, had it been true, would have given Boswell the actual authority to give consent. If Boswell had in fact been in joint control of the gun case, then he could have legally given the officers consent to search it. All three elements necessary to a finding that Boswell had the "*apparent authority*" to give consent having been met, the search of the gun case was lawful.

NOTE: This case is consistent with a lot of prior rulings and is nothing new, but bears repeating. There may be instances, however, where an officer is put on notice that the person from whom consent is being requested *does not* have the authority to give it. The example the Court cites deals with the search of a purse based upon the consent of the purse owner's boyfriend, where it was found that it was unreasonable for the officers to think that the boyfriend had the necessary authority. (See *United States v. Welch* (9th Cir.

1993) 4 F.3d 761.) So sometimes you may have to ask. But as in this case, when you are in a person's home and there's a container out in plain sight, with no one complaining when you ask the resident for consent, you should be on pretty firm ground in assuming that he has the authority to give you that consent.

NOTES:

United States v. McWeeney

(9th Cir. 2006) 454 F. 3d 1030

SUBJECT: Consent Searches and the Right to Withdraw Consent

RULE: Allowing an officer to "*look*" for anything "*they are not supposed to have*" is a consent search. But creating a setting in which a reasonable person would believe that he can't limit or withdraw that consent may invalidate the search.

FACTS: Defendant was the passenger in his mother's car, being driven by a friend, and stopped by an officer of the Las Vegas Metropolitan Police due to the lack of a front license plate. Prior to the stop, the officer also did a radio check of the rear license number, discovering that the car at some point had been reported stolen and subsequently recovered. During the resulting contact, the officer asked both defendant and the driver if they were in possession of anything that "they were not supposed to have." Both subjects replied in the negative and the officer asked if they "mind(ed) if (he) looked." Both subjects said that they didn't mind. The officer ran a warrant check on the subjects before beginning the search. Discovering that defendant was a convicted felon and that the driver had an arrest record for a weapons-related offense, the officer decided to wait for backup before he searched the car. After two other officers arrived some seven minutes later, the two subjects were reminded by the officer that "if you have nothing that you aren't supposed to have, I'm going to take a look." Defendant and the driver were then told to exit their car and stand facing away, towards the officer's car, while the search was conducted. During the search, either the defendant or the driver tried to turn to watch what was happening but was told "to face forward and stop looking back." The officers eventually got to the trunk and noticed that the carpet lining was loose. When it was pulled back, a handgun was found. Defendant was arrested for, and charged in federal court with, being a felon in possession of a firearm. After his motion to suppress the gun was denied, defendant appealed.

HELD: The Ninth Circuit Court of Appeals reversed. Defendant's first complaint was that his consent, merely allowing the officer "*to look*," could not reasonably be understood as permission to search the vehicle's trunk and to look under the carpet lining. The Ninth Circuit rejected this argument noting that when considering the permissible scope of a consent search, the test is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Following prior case law, the Court held here that "an officer does not exceed the scope of a suspect's consent by 'searching' when the officer asked only if he or she could 'look.'" Checking under the trunk's carpet lining, therefore, was no more than part of an otherwise lawful search based upon the defendant's consent to "*look*" for anything that they were "*not supposed to have*." However, defendant (and his passenger) had a constitutional right to modify or withdraw their general consent at any time. In this case, the two subjects were told to stand in a position where they could not observe the search. When one of them attempted to turn to see what was going on, he was ordered to turn back around again. Such a circumstance suggests that the subjects might have been coerced into believing that they were without authority to limit or withdraw their consent. However, the trial court failed to consider this issue. The Court therefore remanded the case back to the trial court for a factual finding on the issue of "whether the officers created a setting in which the reasonable person would believe that he or she had no authority to limit or withdraw their consent."

NOTE: The Courts are not real tolerant of the common police tactic of painting a suspect into a corner (e.g.: "*You don't have anything illegal in your pockets, do you*?") and then using a denial of criminal involvement to coax a consent to a search out of him (e.g.: ""*Then you wouldn't mind me looking, would you*?"). It is improper to purposely put a subject in the position where he feels that by exercising his right to

refuse, he would be incriminating himself or admitting participation in illegal activity. (*Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 725.) But that's basically what the officers did here in this case. And although the Ninth Circuit still approved the initial consent, they were careful to protect the defendant's right to change his mind. And while the officers may have acted out of a reasonable concern for their safety and may have had legitimate reasons to prevent the defendant from viewing the search those facts need to be written in the report. If that is so in your future case, then you need to spell out in great detail the circumstances surrounding the manner taken to restrict the defendants movement, including the words used to instruct the defendant; how and where and why you placed the defendant in a particular location; change in circumstance that occurred between obtaining the consent and when you prevented the defendant from observing the search; and the degree of pressure applied to prevent defendant from observing the search or voicing his objection.

NOTES:

People v. Ledesma

(2006) 39 Cal. 4th 641

SUBJECT: Consent and Exigent Circumstances

RULE: A guest in a residence who has the run of the house in the occupant's absence has the authority to give consent to the police to enter the area where a visitor normally would be received. Police may insist on answering the phone after they have gained consensual entry into a residence where they have probable cause to believe the person calling is a recent fugitive, the call will provide them information about the fugitive's whereabouts, and there is no time to get a warrant before picking up the phone.

FACTS: Defendant and another man robbed a gas station attendant. The attendant told the police that the robbers had fled on a motorcycle and gave the police the license plate number of the motorcycle. The investigating officers went to the address listed as residence of the motorcycle's registered owner. Persons at that address told the police the defendant was no longer residing there but provided the police a fairly specific description of the address where defendant was currently residing. They also told the police that defendant drove a white Cadillac. The police then found the new address (the Cadillac was parked outside of it) and knocked on the door approximately 20 minutes after arriving at the scene. The door was answered by a man named Santiago who said he was not the defendant and that the defendant was not in the house. An officer asked Santiago if he would mind if the officers entered and looked around. Santiago said he was just visiting but that he did not mind and stepped back to let the officers inside. The officers entered and searched the house but did not find the defendant. Either Santiago or another visitor told the police that defendant had called earlier and was expected to call back. When the telephone rang the officers told the guests not to answer the phone. Instead, an officer answered the phone and pretended to be one of the guests. The caller identified himself as the defendant, said he was "hot" and that the police were looking for him. The defendant told the officer to lock the doors of the apartment and the Cadillac and take a walk. On appeal, defendant argued the police had no right to either enter his residence or answer his phone.

HELD: Officers may enter a residence pursuant to the consent of a person whom officers reasonably and in good faith believe has the authority to consent to their entry. The officers could reasonably believe the guest (Santiago) could give consent even though Santiago said he was just visiting because (i) Santiago was present in the apartment in the early evening when defendant was not home and a guest who has the run of the house in the occupant's absence has apparent authority to give consent to enter an area where a visitor would normally be received and (ii) police may assume, without further inquiry, that a person who answers the door in response to their knock had the authority to let them in. The police could properly answer the telephone because (i) they had probable cause to believe (based on what the guests had told them) the incoming call would be from defendant and that by answering it, they could obtain information leading to defendant's imminent arrest and (ii) exigent circumstances to answer the phone existed because the delay required by getting a warrant would result in the loss of this opportunity.

NOTES: In most circumstances, police do *not* have the right to answer the phone in a residence without having a search warrant authorizing them to do so. (See *People v. Harwood* (1977) 74 Cal.App.4th 460.) Also, do not assume the rule allowing guests (who have the run of the house in the host's absence) to consent to entry into an area where visitors would normally be received will apply when there are indications that maybe this particular guest does not have the authority to grant consent.

NOTES:

Brigham City v. Stuart

(2006) 126 S.Ct. 1943

SUBJECT: Entry of a Residence; Exigent Circumstances

RULE: Exigent circumstances justify a warrantless entry into a residence when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

FACTS: Four Brigham City, Utah, police officers responded to a "loud party" call at a residence at 3:00 a.m. Upon arrival, they could hear an altercation occurring which they described as "loud and . . . tumultuous," and consisted of "thumping and crashing" and people yelling "stop, stop" and "get off me." They looked into a front window but could see nothing. Because the noise seemed to be coming from the back of the house, they proceeded down the driveway towards the backyard to investigate. Upon doing so, two juveniles drinking beer were observed in the backyard. As the officers entered the backyard they observed through a screen door and the windows of the kitchen an altercation between four adults and a juvenile. The four adults appeared to be attempting, "with some difficulty," to restrain the juvenile. The juvenile, however, broke free and, swinging his fist, struck one of the adults in the face. As that adult was spitting blood into the sink, the other adults held the juvenile up against a refrigerator with such force so as to cause the refrigerator to move across the floor. At this point, one of the officers opened the screen door and announced their presence. "Amid the tumult, nobody noticed." The officer therefore entered the kitchen and again announced his presence, causing the fight to subside. Everyone got busted with the adults being charged with contributing to the delinquency of a minor, among other charges. Challenging the legality of the officers' entry, the defendants brought a motion to suppress all the evidence recovered in the house. The trial court agreed and granted the motion. The Utah Appellate Court affirmed. The Utah Supreme Court also agreed, holding that the injury caused by the juvenile's punch was insufficient to trigger the so-called "emergency aid doctrine," and that exigent circumstances did not justify the entry because the potential harm involved was insufficient to justify a warrantless entry into a residence. The United States Supreme Court granted certiorari.

HELD: The United States Supreme Court, in a unanimous decision, reversed, finding that what the officers observed did in fact provide them with an objectively reasonable basis for believing that an occupant of the house was seriously injured, or imminently threatened with such injury. As such, *exigent circumstances* justified the warrantless entry. Defendants argued on appeal that the officers were more interested in making arrests than quelling violence and were not primarily motivated by a desire to save lives and property. To this, the Court noted that the officers' subjective intent is irrelevant. "An action is 'reasonable' under the Fourth Amendment regardless of the individual officer's state of mind, 'as long as the circumstances, *viewed objectively*, justify [the] action.'" (Italics in original) Defendants also argued that their own conduct in the house was not serious enough to justify the officers' intrusion into the home, citing authority for the proposition that the gravity of the underlying offense must be balanced with the privacy rights involved, in determining the reasonableness of a governmental intrusion. The Court didn't buy it. Where police officers are confronted with *ongoing* violence within a home, as occurred in this case, an immediate entry is "plainly reasonable under the circumstances." Knocking at the front door would have been a futile act, with the apparent altercation coming from the rear of the house. And then upon observing the fight going on in the kitchen, "(n)othing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse, before entering." Lastly, the Court rejected the defendant's argument that the officers violated the "knock and announce" rules, noting that standing at the screen door and announcing their presence "was at least equivalent to a knock on the

screen door." When their first attempt to get the defendants' attention was ignored, the officers had no choice but to make an immediate entry, it "serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence." A warrantless entry into the residence, therefore, was lawful.

NOTES:

People v. Ormonde

(2006) 143 Cal.App.4th 282

SUBJECT: Search and Seizure: Protective Sweep of a Residence

RULE: A "*protective sweep*" of a residence for other suspects who might constitute a danger to officers and others requires a *reasonable suspicion* to believe that there is in fact someone there to be concerned about.

FACTS: Detective Patrick Clouse of the Santa Clara Police Department responded to a call about a domestic violence ("DV") incident that had occurred in the area of Homestead Road, where the victim was found. Ultimately, however, the detective was directed to apartment B in a nearby apartment complex. Contact was made with Christopher Olson, who was standing near a car that was parked in front of apartment B. Olson was about 10 feet from the open front door of the apartment. When contacted, Olson immediately became argumentative. Detective Clouse received information by radio from officers who were simultaneously interviewing the DV victim, and thus determined that Olson was the suspect and arrested him. Information also suggested that Olson either worked or lived in the apartment and that the DV incident had occurred either inside or in front of the apartment. Detective Clouse knew that DV calls were among the most dangerous calls with which officers become involved. The people present are often highly emotionally charged and events at such calls are "highly unpredictable." They usually occur in someone's home, where guns and knives are accessible, and where other persons, sympathetic to the parities involved, must often be dealt with. Although he could see partially into the apartment through the open front door and a front window, Detective Clouse felt vulnerable because much of his view of the home's interior was blocked by a closed inner door. Concerned that there might be someone in the apartment who might be armed, Detective Clouse decided to check. With another officer holding onto the still uncooperative Olson, Detective Clouse stepped two to three feet inside the apartment and announced his presence. The closed door opened, and defendant, a woman, and a young child all came out. Detective Clouse asked them all to step outside to talk with him, which they did. While talking to defendant, Detective Clouse was informed by other officers that Olson was a methamphetamine user. When asked for permission to search the apartment for any evidence of drug use by Olson, defendant told Detective Clouse that Olson only had access to the kitchen and that he could search there. While searching the kitchen, Detective Clouse received more information from other officers that defendant himself was a drug dealer and that he had a quantity of drugs in the top dresser drawer in his bedroom. When asked about this, defendant admitted to possessing drugs and gave the officers permission to go into his bedroom and seize the drugs from the dresser. This led to additional consent to seize more drugs from a backpack. (Defendant and others at the residence gave a much different version, testifying that Detective Clouse and other officers entered the apartment at will, and threatened defendant to get him to admit to possessing drugs.) Charged in state court with numerous drug-related offenses, defendant's motion to suppress the evidence was denied. He pled guilty and appealed.

HELD: The Sixth District Court of Appeal reversed. Defendant's argument on appeal was that Detective Clouse's initial entry into the apartment, labeled as a "*protective sweep*," was illegal, and that the various consents were the direct products of this illegal entry. The Court of Appeal agreed. A warrantless entry into a residence normally requires "*probable cause*" and either a search warrant or exigent circumstances. Here, it was already known that the domestic violence victim was not in the apartment, and Olson himself was in custody outside. And there was nothing to indicate that there were any other victims or suspects who might be inside. An exception to the probable cause requirement is when an officer has a "*reasonable belief*" (or "*reasonable suspicion*") to believe other people might be inside who constitute a danger to the officers or others at the scene. In such a case, the law allows a limited "*protective sweep*" to insure that no

one might be there who constitutes such a danger. A "*protective sweep*" is defined as "a cursory visual inspection of those places in which a person might be hiding." In this case there was nothing to indicate that there might be anyone inside who constituted a danger to the officers or others. In fact, the detective specifically testified that: "I don't think that I thought there were people in the house, I was just trying to determine if there were people in the house." The fact that domestic violence incidents tend to be dangerous is not enough. If it were, then the Court would be authorizing a "domestic violence" exception to the warrant requirement, and the justices were not willing to do that. There must be some other specific, articulable facts providing the necessary "*reasonable suspicion*" to believe that there is someone inside who constitutes a danger. There was no such information in this case to justify the protective sweep.

NOTES:

People v. Thompson

(2006) 38 Cal.4th 811

SUBJECT: Exigent Circumstances/Warrantless Arrests

RULE: Exigent circumstances may justify a warrantless entry into a residence for the purpose of arresting a person suspected of recently driving while under the influence.

FACTS: A concerned citizen spotted the defendant passed out in a Ford Bronco parked in the citizen's assigned parking space. Another person woke the defendant up and asked him to leave. The defendant got out, stumbled around, tossed an empty Vodka bottle out of the Bronco, and passed out a second time, before eventually driving off. The citizen, who had seen the defendant in an intoxicated condition on many occasions, decided to follow him. The citizen called 911 to report the situation. The citizen saw the defendant driving recklessly and violating numerous traffic laws before she lost track of him. However, an officer arrived on the scene and told the citizen to wait while he continued the pursuit. The officer went to the residence listed as the address of the Bronco's registered owner and found the Bronco parked in front. The citizen was brought to residence and she identified the Bronco as the one she had been following. An officer then touched the hood of the Bronco; it was still warm. Two officers went to the front door of the residence and rang the doorbell. The owner of the house told the officers that defendant was asleep inside but that they could not come in. One of the officers spotted a man fitting the description of the defendant leave the house and enter the backyard. The officer made eye contact with the defendant and motioned for him to come to the front door. The defendant reentered the house and approached the officers. He was staggering or swaying slightly, slurring his speech, and smelled of alcohol. The officer explained to the defendant they suspected him of driving under the influence of alcohol and wanted to talk to him and perform some tests. The defendant refused to cooperate and began walking away. The officer entered the house and, concerned defendant might flee, placed his hand on defendant's shoulder. Defendant resisted and the other officer then entered to assist in the arrest. After he was arrested, defendant was given a test showing a blood alcohol level of .21 percent and made incriminating remarks. Defendant moved to suppress any evidence obtained after the police made entry. Eventually, the question of whether the entry was proper made its way up to the California Supreme Court

HELD: The court first held there was ample probable cause to arrest defendant for driving under the influence based on the citizen's observations, the officer's observations made at the door, and reasonable inferences that the person inside the residence fitting the citizen's description was the person whom the citizen had observed**.** The court then reiterated the general rule that the imminent destruction of evidence is an exigent
circumstance justifying a warrantless entry into a residence to make an arrest and held that the dissipation of blood-alcohol evidence may constitute an exigent circumstance (i.e., the imminent destruction of evidence) allowing a warrantless entry into a home under certain circumstances. Such circumstances existed in the instant case.

NOTE: In holding that exigent circumstances justified the entry, the court declined to state that police may enter a home without a warrant to arrest a DUI suspect in *every* case. Thus, while it is difficult to comprehend a circumstance where a DUI suspect could *not* be brought out for purposes of getting a timely analysis of his blood, we should take this as a warning to be careful to thoroughly document the need to make a warrantless entry under such circumstances. For instance, the court described how this particular defendant had actively and dangerously fled from the citizen who reported him, was apparently thinking

about escaping out through the backyard, could easily corrupt the validity of a delayed test of his blood by drinking more alcohol, refused to cooperate when the police asked him to come to the front door, and who, with the front door wide open and him standing in plain view, had seriously diminished any expectation of privacy he might have had. Factors such as this, and how you exhausted all less intrusive ways to resolve the problem, should be stressed in your reports.

NOTES:

Samson v. California

(2006) 126 S.Ct. 2193

SUBJECT*:* Suspicionless Parole Fourth Waiver Searches

RULE: A search of a parolee, done without any suspicion of renewed criminal activity, is constitutional so long as not done arbitrarily, capriciously, or for purposes of harassment.

FACTS: Officer Rohleder observed defendant innocently walking down the street and recognized him as a parolee. Believing that defendant had an outstanding "parolee at large" arrest warrant, Officer Rohleder stopped him. Defendant's denial that he was wanted was confirmed through a radio check. But since he had defendant stopped anyway, Officer Rohleder conducted a search of defendant's person. A baggie of methamphetamine was found in a cigarette box in his shirt pocket. Charged in state court with possession of methamphetamine, defendant filed a motion to suppress the methamphetamine, arguing that the search of his person was illegal absent at least a reasonable suspicion that he was involved in criminal activity. Noting that, as a parolee and subject to search and seizure conditions as dictated by Penal Code section 3067, subdivision (a), and that the search of his person was not "arbitrary or capricious," the trial court denied defendant's motion. He was subsequently convicted by a jury trial and sentenced to seven years in prison. The state District Court of Appeal affirmed. Defendant petitioned the United States Supreme Court.

HELD: The United States Supreme Court, in a split 6-to-3 decision, affirmed. The United States Supreme Court decided in 2001 that a *probationer* who is subject to search and seizure conditions (i.e., a "*Fourth Waiver*") may be searched with as little as a mere "*reasonable suspicion*" that the probationer is again involved in criminal activity. (*United States v. Knights* (2001) 534 U.S. 112.) The Court in *Knights*, however, specifically left open the question whether a probationer who is subject to a Fourth Waiver may be searched on *less* than a reasonable suspicion. (*United States v. Knights* (2001) 534 U.S. 112, 120, fn. 6.) That question, as to a parolee, is answered in this case. *Knights* set out the legal standards to be used in evaluating the constitutionality of a search on less than probable cause, requiring courts to consider the "*totality of the circumstances*" and to balance "the degree to which (the search) intrudes upon an individual's privacy" with "the degree to which (the search) is needed for the promotion of legitimate governmental interests." *Knights* further noted the high recidivism rates for probationers and the "*legitimate governmental interest*" in monitoring the activities of persons on probation, thus "significantly diminish(ing)" a probationer's "*expectation of privacy*." The same is true for parolees, and maybe even more so. In fact, on a "'continuum' of state-imposed punishments, . . . parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." "(P)arole is the stronger medicine; ergo, parolees enjoy even less of the average citizen's absolute liberty than do probationers." All parolees in California, should they choose not to remain in prison for all of their term as the alternative, are subject to search and seizure conditions as a requirement of their parole. Even when the prison inmate chooses parole, however, he remains in the legal custody of the California Department of Corrections through the remainder of his term. Penal Code section 3067, subdivision (a), provides that, "Any inmate who is eligible for release on parole . . . shall agree in writing to be subject to search and seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Defendant in this case, as with all parolees, signed a wavier of his rights to this effect. Being fully cognizant of this, any expectations of privacy defendant might have had were therefore diminished to the degree where he could no longer reasonably expect to be free from suspicionless searches of his person and property. Lastly, the Court answered concerns about giving law

enforcement officers such "a blanket grant of discretion untethered by any procedural safeguards" by noting that California case law restricts parole searches to those which are not arbitrary, capricious, or done for purposes of harassment. Under such circumstances, a suspicionless search of a parolee is lawful.

NOTE: The Court specifically did not address the legal theory of consent for parole searches. (See p. 2199, fn. 3.) The legal consent theory is that a parolee or a probationer consents to a search and seizure and thus completely waives any Fourth Amendment protections. Since the issue was not properly raised in the lower court in this case and the California Supreme Court has not addressed the issue, the Court declined to decide the case on this ground.

NOTES:

Motley v. Parks

(9th Cir. 2005) 432 F. 3d 1072

SUBJECT: Suspicionless Fourth Wavier Searches and Civil Liability

RULE: The evidentiary standard for a Fourth Wavier search is not a settled issue in the law. As such, officers who conduct a suspicionless search have qualified immunity from civil liability. Also, a Fourth Wavier search of a particular residence is lawful so long as the officers have "*probable cause*" to believe that the target of the search lives there.

FACTS: Janae Jamerson, a member of the "Four Trey Crips" street gang in Los Angeles, was released on parole in Februrary, 1998. As a parolee, he was subject to the "*Fourth Waiver*" search and seizure conditions as specified in Penal Code section 3067. At some point in the next year, Jamerson moved in with his girlfriend, Darla Motley. In February, 1999, Jamerson's parole was revoked and he was sent back to prison. Six weeks later, the "Newton Street Taskforce," comprised of L.A.P.D. officers, State Parole and federal officers, planned to conduct a parole sweep targeting gang-related violence and criminal activity. Jamerson was among the list of parolees targeted for this operation despite the lack of any reason to believe he might again be involved in illegal activity. The officers were apparently unaware that Jamerson had already been violated and sent back to prison. In March, 1999, the parole sweep was conducted with an L.A.P.D. officer, two ATF agents and a California parole agent going to Motley's apartment; Jamerson's last known address. Despite Motley's protestations that Jamerson no longer lived there, she eventually allowed them to search her apartment because the officers (falsely) claimed to have a warrant. Motley also alleged that the L.A.P.D. officer who searched her bedroom "trained" his firearm at her five-week-old son who was lying on the bed. Finding nothing, the officers eventually left. Motley later filed a 42 U.S.C. § 1983 civil rights civil suit in federal District Court. The federal judge granted the officers' motion for summary judgment, finding that they all had qualified immunity. Motley appealed.

HELD: Except for reversing the trial court's dismissal as to the allegation that the L.A.P.D. officer had used excessive force on Motley's infant son by unnecessarily pointing his gun at him, an en banc panel of the Ninth Circuit Court of Appeals affirmed the trial court's dismissal of the law suit (reversing its earlier ruling to the contrary at 383 F.3d 1058). First, the Court specifically declined to decide whether the officers needed a reasonable suspicion of criminal activity, or no suspicion at all, to justify conducting a Fourth Waiver search on a parolee. That issue was decided by the United States Supreme Court in *Samson v. California*; (126 S.Ct. 34.) The second issue is whether the officers had sufficient information to believe that Jamerson lived at Motley's residence at the time of the search. Prior decisions have required that before an officer can make a non-consensual entry into a residence to do a parole (or probation) Fourth Waiver search (or to arrest someone on an arrest warrant), the officers must have at least a "*reasonable grounds for believing*" that the parolee (or probationer, or target of an arrest warrant) resides at the residence they want to search. The phrase "*reasonable grounds for believing*" has been interpreted to mean that there must be full-blown "*probable cause*" to justify the entry. Here, the officers relied upon information from their supervisor. The supervisor testified to having delegated the responsibility for determining where Jamerson lived to his subordinates, but that he himself had contacted Jamerson at Motley's residence on prior occasions. Also, the officers were not required to accept Motley's assertions that Jamerson did not live there in that Motley was certainly less than a disinterested party. Based upon these circumstances, the officers had probable cause to believe that Jamerson did in fact reside there at the time. The Court did find, however, that it must be determined by a civil jury whether Motley's allegations are true that the L.A.P.D. officer pointed his gun at her five-week old son (a Fourth Amendment, excessive force, violation) while searching her bedroom.

But except for this allegation, the rest of Motley's civil case was properly dismissed by the District Court judge.

NOTE: Interestingly enough, on the issue of the need for probable cause to believe that they had the parolee's correct current residence, the Court apparently attached no significance to the fact that Jamerson's parole had been violated some 6 weeks earlier and that State Parole officers were a part of this taskforce and participated in the search of Motley's apartment. Although mentioning briefly the theory of "*collective knowledge*," and how all the officers engaged in this operation adopt the knowledge held by the others, it was not discussed why, when State Parole should have known that Jamerson was presently residing in prison, this information did not detract from their probable cause to believe he resided with Motley at the time of the search. Even when the Ninth Circuit rules in favor of law enforcement, it is sometimes difficult to figure out what they're thinking.

NOTES:

United States v. Howard

(9th Cir. 2006) 447 F. 3d 1257

SUBJECT: Fourth Waivers and Residential Searches

RULE: A Fourth Waiver allowing for a warrantless search of a suspect's residence requires that the officers establish probable cause to believe that the suspect has in fact established the place to be searched as his residence.

FACTS: Defendant was placed on federal "supervised release," or "probation" ("parole," in state practice) after doing a stint in federal prison for a bank robbery conviction. As a condition of his release, he was subject to a "search clause" (i.e., a "Fourth Waiver") that allowed for the warrantless search of his residence, person, property, and automobile at any time and was required not to associate with any convicted felons. He reported his residence to his probation officer (P.O.) as being on East Owens, in Las Vegas, Nevada. Defendant eventually met Tammi Barner, a seven-time convicted felon and recovering cocaine addict, who was on state probation. Barner and defendant asked the P.O. if, despite her criminal history and defendant's probation conditions, they could maintain a "relationship." The P.O. told them no. Subsequently, the P.O. received information from a confidential informant (C.I.) that defendant was staying at the apartment building on West Bonanza where Barner lived (the C.I. did not know state which apartment) and that he stored a gun there. After several months of periodic surveillances, and by checking with Barner's apartment manager, the owner of the apartment who subleased it to her, her neighbors, and defendant's neighbors at his East Owens residence, it became apparent that although defendant still maintained his East Owens address, he was also shacking up with Barner at her apartment on a regular basis. Finally, after receiving information from another C.I. that defendant was a gun dealer and possibly involved in a street gang, the P.O. went to Barner's apartment. Defendant was observed coming out from Barner's door a 6:30 a.m., sans shirt, and stretching for some 10 to 15 minutes. Shortly afterwards, Barner and defendant came out together and were detained. Barner admitted that some of defendant's personal belongings were in the apartment but refused to consent to a search. After Barner was released and left the scene, the P.O. decided to search Barner's apartment anyway, but discovered that he couldn't get in. Defendant did not have a key. The owner of the apartment then showed up and let the P.O. in with his key. A gun, which defendant acknowledged was his, was found in the closet. Charged with possession of a stolen firearm, defendant's motion to suppress the gun and his statements was denied. He pled guilty and appealed.

HELD: The Ninth Circuit Court of Appeals reversed. Defendant's Fourth Waiver allowed for the warrantless search of *his residence*; not the residences of others with whom he might be visiting. In order to justify the search of Barner's apartment under defendant's Fourth Waiver conditions, there must be "probable cause" to believe that the apartment was also defendant's residence. Spending the night there occasionally is not enough. In comparing the facts of this case with prior cases, the court determined that the P.O. did not have enough information to support the conclusion that defendant did any more that periodically shack up with Barner. It was apparent that defendant still maintained his own residence on East Owens. Factors the court considered include: (1) no one ever identified Barner's specific apartment as where he lived, (2) officers surveilling Barner's apartment for a month prior to the search never saw defendant there, (3) defendant did not have a key to Barner's apartment, and (4) visits to defendant's East Owens' residence indicated that he still maintained an apartment there where he continued to keep clothing and other personal belongings. As such, the P.O. did not have probable cause to believe that defendant lived at Barner's apartment. The search of her apartment without her consent, therefore, was unlawful.

NOTE: This opinion relies upon the Ninth Circuit's assumption that a person can have only one residence. California's registered sex offender statute (i.e., Pen. Code, § 290, subd. (a)(1)(B)), for example, recognizes that a person might have more than one "residence address at which he or she regularly resides, regardless of the number of days or nights spent there." But according to the Ninth Circuit, a person on a Fourth Waiver apparently can only reside in one residence at a time.

NOTES:

People v. Hunter

(2006) 140 Cal.App.4th 1147

SUBJECT: Fourth Waivers and Revocation of Parole

RULE: A parolee remains subject to the search and seizure conditions of his parole, even if in custody, until parole is formally revoked at a parole revocation hearing.

FACTS: Defendant, a parolee, committed a residential burglary in June, 2003, taking some $8,000 in jewelry and the victim's Lexus automobile. In July, a deputy sheriff spotted the stolen Lexus at a local casino and attempted to make contact with its driver. The driver (presumably, our defendant) fled on foot and escaped. However, he left in the car some of the stolen jewelry, a receipt for a U-Haul storage unit, and the phone number for defendant's parole agent. A warrant for defendant's arrest had already been issued earlier in July, based upon allegations that he was using drugs and for failing to report to his parole agent. He was subsequently arrested on August 1st on the warrant and returned to prison with a "parole hold" to await a parole revocation hearing. Two weeks after defendant's arrest, but before his parole hearing, his parole agent and local police officers conducted a warrantless Fourth Waiver search on defendant's U-Haul storage unit, recovering more of the stolen jewelry. The police investigator then visited defendant in prison, extracting from him some admissions. It wasn't until over a month later that defendant finally had his parole revocation hearing where his parole was formally revoked. Charged with residential burglary and auto theft, defendant made a motion to suppress the evidence found in the storage unit and his later admissions, arguing that his Fourth wavier was no longer valid after his arrest. The trial court disagreed, denying his motion. Convicted after a jury trial, defendant appealed.

HELD: Defendant's argument was that upon being taken into custody and returned to prison, he was no longer subject to the conditions of his parole, including the waiver of his search and seizure rights. The Court disagreed, noting that the Fourteenth Amendment "due process" clause guarantees him the right to a hearing on whether his parole should be revoked or not. This hearing, by statute (Cal. Code of Regs., title 15, § 2640(e)), is to be held within 45 days of the parolee being taken into custody. His parole cannot be revoked until he has had his parole hearing. At this hearing, it is decided whether to formally revoke his parole or release him back into the community. Until then, he is still a parolee, subject to all the terms and conditions of his parole. In this case, defendant had not yet had his parole hearing when the warrantless search of the storage unit took place. The search, authorized by the terms of defendant's Fourth wavier, was lawful. His later admissions, therefore, were also lawfully obtained.

NOTE: The same rule holds true for a *probationer* who is on a Fourth Waiver, even if a court has already "*summarily revoked*" probation; a common practice before the probationer is brought to court. Until the state provides a probationer with his "due process" right to a formal probation revocation hearing, a probationer is still subject to the conditions of his probation including, if he's on a Fourth waiver, warrantless searches and seizures. (*People v. Barkins* (1978) 81 Cal.App.3d 30.) It's irrelevant that he may be sitting in jail while awaiting that hearing.

NOTES:

United States v. Washington

(9th Cir. 2006) 462 F. 3d 1124

SUBJECT: Booking Questions, Invocation of Miranda

RULE: Asking about gang moniker and gang affiliation is a routine booking question and not interrogation requiring *Miranda* advisements. Agreeing to listen to interrogators without an attorney present, in response to a *Miranda* advisal, is *not* an invocation of one's right to the assistance of counsel nor to remain silent.

FACTS: Defendant and three others committed an armed bank robbery, with defendant's involvement being that of the lookout. Video cameras in the bank took pictures of the suspects, including defendant. As a result, he was promptly identified and, three months later, arrested. Taken to the office of the FBI and questioned, Special Agent Peter Taglioretti first asked the in-custody defendant a series of background questions such as his name, date of birth, address, medical condition, gang moniker and gang affiliation. Agent Taglioretti asked defendant his gang moniker and affiliation to verify information that he had already received from the police and for purposes of classification and prisoner safety while in jail. After discussing with defendant the charges against him, his ability to cooperate, and, in response to defendant's questions, the sources of Agent Taglioretti's information about defendant's involvement, defendant was advised of his *Miranda* rights. Defendant responded that he was willing to listen to the agents without an attorney present. So Agent Taglioretti wrote on a *Miranda* waiver form; "agreed to listen w/o atty present." Defendant signed and initialed this form. Agent Taglioretti showed defendant photographs of the other robbers they had in custody and explained to him what information they had about the robbery. Defendant then volunteered that; "I can't do no time but I know I am." When shown surveillance photographs of the robbery, defendant admitted that he was the person depicted in the photos. Charged in federal court with bank robbery (and other charges), his motion to suppress these statements was denied. Defendant appealed.

HELD: Except for remand to the trial court for resentencing, the Ninth Circuit Court of Appeals affirmed defendant's conviction. Defendant first complained that to ask him for his gang moniker, which was done prior to being advised of his *Miranda* rights, was an improper interrogation. The Court, however, found that to ask for identification information, including his gang moniker, does not qualify as an interrogation. An "interrogation," for purposes of *Miranda*, is defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." (Parenthesis in original.) In this case, the FBI Agent testified that he asked this question to verify what he already knew, and to obtain information for the purpose of classification while in custody, to protect defendant's safety. As such, "the question about (defendant's) gang moniker was routine gathering of background information, not interrogation." The Court also rejected defendant's argument that his response to the *Miranda* advisal that he was willing to listen to the agents without an attorney present was an invocation of this right to an attorney and/or to his right to remain silent. To be legally effective, a request for the assistance of an attorney, made in response to a *Miranda* advisal, must be "clear and unequivocal." Here, the Court determined that defendant's response to the *Miranda* advisal could not even be classified as "equivocal," let alone "unequivocal." Neither did defendant invoke his right to silence. He told the agents that he was willing to listen to what they had to say, and didn't need an attorney to do that. This was not a *Miranda* invocation to either an attorney or to remain silent.

NOTE: Although the Court did not provide either of these analyses or even discuss these options, there are a couple ways of viewing the second half of the Court's decision regarding defendant's response to his *Miranda* advisal. It could be argued that defendant's statement that he was willing to listen without an attorney present was an implied waiver of his *Miranda* rights. This argument presumes that, since defendant did not invoke his rights, he necessarily waived them. However, the more cautious approach is to view the

court's ruling as allowing officers, under these facts, to do some limited pre-waiver interrogation. Specifically, officers who want to interview a suspect do not ordinarily violate *Miranda* if, before obtaining a waiver, they provide him with a quick and factual summary of the evidence against him. (See, e.g., *People v. Patterson* (1979) 88 Cal.App.3d 742.) In some cases, however, the courts have ruled that the officers' recitation constituted unlawful pre-waiver interrogation because it was, in reality, a goad to get the suspect to waive his rights. (See *United States v. Padilla* (2004) 387 F.3d 1087, 1093.) However, in light of this case, it appears that officers who want to question a reluctant, but not invoking, suspect could begin by asking if he would like to know about the evidence that has been uncovered so far. If he says yes, they could do what the FBI agents did here, i.e., ask him to waive his "right" not to listen to them. If he does so, officers should be able to provide a longer and more plain-spoken account of the evidence than they could have done without such a waiver. Keep in mind, however, that a full *Miranda* waiver should be given before asking any questions.

NOTES:

People v. Huggins

(2006) 38 Cal.4th 175

SUBJECT: Miranda; Volunteered Statements: Invocation of Rights as Evidence of Guilt: The Sixth Amendment and Deliberately Eliciting Incriminating Statements

RULE: (1) Volunteered statements, not made in response to an interrogation, are admissible. (2) A subsequent invocation of rights may be admissible is relevant to something other than defendant's consciousness of guilt. (3) A law enforcement officer telling a capital case defendant that he deserves to get the death penalty, prompting an incriminatory response, is neither a Fifth Amendment (self-incrimination) nor a Sixth Amendment (right to an attorney) violation.

FACTS: Defendant was an escapee from a California Youth Authority (CYA) work crew. While in flight, he took refuge in the nearby home of Sarah Anne Lees. When Sarah Lees arrived home, defendant confronted her with a shotgun he had found in her home and shot her in the back. He also hit her at least once in the face; probably with the butt end of the shotgun. He then dragged her to the bedroom where he pulled off most of her clothing and attempted to rape her. He took her jewelry from her person and money from her purse, and escaped in her truck. Lees died from the gunshot wound. Defendant was subsequently arrested and charged with murder (with special circumstances, including the killing of the victim during an attempted rape), burglary and robbery. When first taken into custody, detectives were setting up a tape recorder in preparation for an interview as they explained to him that he was a suspect in Sarah Lee's murder. Defendant spontaneously admitted at that point that he had escaped from a CYA work detail, but denied having any contact with Lees. He then asked to speak with a public defender. The interview, therefore, was terminated without ever reading his rights under *Miranda*. At trial, the prosecutor had one of the detectives testify to these brief statements and that the interview was then ended due to defendant's request to talk to an attorney. The prosecutor later argued to the jury that, in light of all the evidence proving defendant did in fact have contact with Sarah Lees, defendant had lied and therefore could not be believed. After being convicted, during the penalty phase, defendant was being brought to court when one of the escorting deputies told defendant that he was glad he was facing the death penalty and hoped he would be executed. A second deputy clapped in approval when she heard this comment. Defendant asked the deputy who clapped whether she would clap if he was in fact given the death penalty, to which the deputy said that she would. A third deputy then told defendant: "I see you're still making friends." To this, defendant replied: "Don't nobody like me anyway, and if I had it to do again, I'd do it the same way. I don't have any remorse. If I did have remorse, I wouldn't have done it in the first place." The prosecution was allowed to have these deputies testify to this comment during the trial's penalty phase. Defendant was in fact sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court, in a 7-to-2 decision (although the two dissenting justices did not object to the issues discussed here), affirmed defendant's conviction and death sentence. Among the issues raised by defendant in his appeal was the use at trial of his statements made in response to being told that he was a murder suspect, without benefit of a *Miranda* admonishment and waiver. The Court agreed that defendant was in custody, but found that merely telling him that he was a murder suspect was not an "*interrogation*." Before *Miranda* applies, an in-custody suspect must be subjected to an interrogation, or at least the "*functional equivalent*" of an interrogation. An "*interrogation*" includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Merely telling him that he is a murder suspect was not calling upon him to confess. In fact, all it did was provoke a denial that he had had any contact with the victim. His denial being nothing more than an unsolicited, volunteered statement, using that denial against him at trial, therefore, did not violate his *Miranda* rights. Defendant also objected to the detective's testimony

to the effect that he had asked for a public defender. It is error to use a defendant's invocation of his right to an attorney as evidence of guilt. But it is *not* error when the fact of an invocation is relevant to something other than a defendant's consciousness of guilt, and is not offered for the purpose of penalizing a defendant for invoking a constitutional right. Here, the evidence of his invocation was offered solely for the purpose of showing the jury that the interview had ended after defendant's denial that he knew the victim. The prosecutor never made any reference to defendant's invocation on the issue of guilt. "(T)his brief and mild reference to the fact that defendant asked for an attorney did not prejudice defendant." Lastly, defendant argued that his Fifth (self-incrimination), Sixth (right to an attorney) and Fourteenth (due process) Amendment rights were violated by the admission at the penalty phase of his comment to the sheriff's deputies that he didn't feel any remorse for having murdered Sarah Lees. The Court again ruled here, as it did earlier, that there was nothing said or done by these deputies that they should have expected would elicit an incriminating response. Defendant's statements, therefore, were volunteered and not in response to any "interrogation," as that term is legally defined. Similarly, the deputies did not violate defendant's Sixth Amendment right to the assistance of his counsel. Although the test is different for an alleged Sixth Amendment violations (i.e., whether the deputies did something to "*deliberately elicit*" an incriminating response), their conversation with defendant about their belief that he should be executed did not rise to that level. Because neither the Fifth nor the Sixth Amendments were violated, defendant's due process rights were accordingly respected.

NOTE: This case is a good refresher on what constitutes an "*interrogation*," or its functional equivalent. It also discusses the Sixth Amendment, right to an attorney, issue, as well; the Sixth Amendment protections kick in when the defendant has been arraigned (or, sometimes, even earlier). Correctional officers are often involved in situations where they are having a casual conversation with a defendant who has a pending case and legal representation. Officers should report these conversations to the assigned prosecutor, but at the same time, be careful not to do or say anything that could be interpreted as "*deliberately eliciting*" incriminating responses. There can sometimes be a very fine line between the two. But now we know from this case that telling the capital case defendant who cold-bloodedly assaulted and murdered an innocent woman that he is a piece of pond scum with absolutely no redeeming social value and deserves to be drawn and quartered does not constitute the "*deliberately eliciting*" prohibited by the Sixth Amendment.

NOTES:

Williams v. Stewart

(9th Cir. 2006) 441 F.3d 1030

SUBJECT: Miranda; Implied Waivers

RULE: A *Miranda* waiver may be implied when an in-custody criminal suspect, after having received a *Miranda* admonishment, initiates an incriminating conversation.

FACTS: In March, 1981, defendant was observed by half a dozen witnesses wandering around a Scottsdale, Arizona, residential neighborhood. He even knocked on the door of one neighbor, Sylvia Bunchek, and asked her if the residents next door were home. When told that they were not, he went to that house and kicked the door in, intending to burglarize it. Sylvia became concerned when she saw defendant head in the direction of her neighbor's house and told her husband, John Bunchek, about him. John went next door to check. When he didn't return, Sylvia went next door to investigate, only to find her husband in a pool of blood dying from a single gunshot to the chest. With a composite sketch of defendant being televised, defendant was soon identified through his roommates. Defendant, however, had already fled the state. Three months later, defendant was arrested after a shootout (while using the same gun he used to kill John Bunchek) with the FBI in New York. Wounded in the shootout, defendant was advised of his *Miranda* rights and transported to a hospital. At the hospital, a nurse, in defendant's presence, asked the FBI agent who was accompanying defendant what he had done. When the FBI agent responded that "he killed a bunch of people down south," defendant was heard to mumble "no, no, no." The FBI agent then asked him; "What about the old man in Scottsdale." To this, defendant replied something to the effect that: "None of this would have happened if I hadn't been framed in the first place." (This comment, it was later determined, was a reference to a 1975 murder conviction defendant sustained in West Virginia only to later escape from custody, killing a guard in the process.) Defendant filed a motion to suppress these statements, arguing that his silence during the time interval between the admonition and the later making of these statements should be interpreted as an invocation of his right against self-incrimination. The trial court disagreed and denied defendant's motion, finding that this period of silence was not an invocation. To the contrary, the court ruled that despite never having expressly waived his rights, by interjecting himself into the conversation between the FBI agent and the nurse, defendant had *impliedly* waived his rights, and that his incriminating admissions were therefore voluntary and admissible. Defendant was convicted and sentenced to death. The Arizona Supreme Court affirmed. Defendant subsequently filed a petition for Writ of Habeas Corpus in federal court, which was denied. This appeal to the Ninth Circuit Court of Appeals followed:

HELD: The Ninth Circuit Court of Appeals affirmed. The Court agreed with the trial court's conclusion that when the defendant initiated the conversation that led to his incriminating statements—voluntarily interjecting himself into the FBI agent's conversation with the nurse—defendant impliedly waived his rights under the *Miranda* decision. Also, it was noted that the People did not even seek to use his statements against him; that it was defendant himself who chose to present evidence of these statements. But either way, the prosecution was entitled to use such non-coercive statements for purposes of impeachment once defendant took the witness stand and lied. That's all the prosecution did here in this case.

NOTE: The Court didn't attempt to get into much of a discussion on this issue. On its face, the situation includes all the necessary elements of a *Miranda* custodial interrogation; i.e., (1) custody, (2) interrogation (or questions you would expect to elicit an incriminating response) (3) by a law enforcement officer. But rather, the Court just notes that by interjecting himself into the FBI agent's flirting with a nurse, he, in effect, impliedly waived his rights under *Miranda*. But other courts might very well have delved into a more in-depth

discussion of the situation, noting that this brief, non-intrusive verbal exchange was not really the type of "incommunicado interrogation" that *Miranda* had intended to address. The Court also notes two lesser *Miranda* issues: (1) the lack of a need for a mental health expert to admonish the defendant when it is the defendant who requested that he be interviewed by that expert; and (2) the necessity for a *Miranda* admonishment and waiver when interviewed by probation officer during a pre-sentencing hearing interview; the "sentencing hearing" in this case apparently being the penalty phase of this death penalty case.

NOTES:

People v. Guerra

(2006) 37 Cal.4th 1067

SUBJECT: Miranda; Voluntariness After Waiver

RULE: Constitutional voluntariness of a suspect's statements is not affected by a threat to arrest the suspect and other interrogation tactics under circumstances where the suspect continually expresses a desire to talk.

FACTS: Defendant was working on a construction project at a private residence. Kathleen Powell lived next door. Powell often provided sandwiches and beverages to the workers. On several occasions Powell expressed concern to others, including the other workers, about defendant, who would come over to her house and walk in uninvited, usually when drunk. He was told several times by Powell and the other workers not to go into Powell's house. Defendant, however, would respond by simultaneously gyrating the lower portion of his body and thrusting his hips forward, saying in broken English: "Kathy for me; me for Kathy." One evening, Powell was found by her boyfriend dead on her kitchen floor with multiple stab wounds and a kitchen knife on her chest. Physical evidence found at the scene (e.g., a bloody palm print and fingerprints) connected defendant with the murder. The day after Powell's murder, defendant was contacted at his work by homicide detectives and asked to accompany them to the police station. Defendant agreed to go with them after being told that he was not under arrest. He was transported without handcuffs and taken to an interrogation room. Through the use of a translator, defendant was again told that he was not in custody or under arrest and that he was there voluntarily. However, he was read his *Miranda* rights. In response, defendant indicated that he didn't need an attorney and wanted to talk to the investigators, and that he couldn't afford an attorney anyway. When it was reiterated that the attorney would be provided for free, defendant said that, in that case, he wanted an attorney. The investigator responded with: "Okay, understand this, if he (speaking through the translator) wants the attorney and doesn't wish to speak to us, then from the information that we have, he's going to be arrested for murder and we'll book him into jail right now." When told this, defendant changed his mind and said that he'd "rather speak with them." Questioning led to defendant's denials that he'd ever even been in the victim's house, ever approached her, or even spoke to her. After consenting to going to his house with the investigators to retrieve the clothing he had worn the day of the murder, defendant was finally arrested and booked. Four days later, but still before arraignment, defendant was interviewed again. This time defendant waived his *Miranda* rights again and eventually made some damaging admissions. He was tried for murder with the special circumstance that he killed Powell during the commission of an attempted rape. The trial court denied defendant's motion to suppress the statements he made at his first interview. As to the second interview, the trial court suppressed the statements on the ground that they were obtained during a delay in his arraignment (Pen. Code, § 825), but allowed the statements to be used for impeachment purposes. He was convicted of first degree murder with the special circumstance and sentenced to death. His appeal to the California Supreme Court was automatic.

HELD: The California Supreme Court unanimously affirmed on this issue. On appeal, defendant challenged the trial court's rulings on the admissibility of his statements from his first interview, and the use of his statements from his second interview for purposes of impeachment. Conceding that he had been properly advised of his *Miranda* rights (thus waiving any *Miranda* issues), defendant argued that his statements from the first interviews were not "*voluntarily*" obtained, a Fourteenth Amendment, "*due process*" violation, and therefore should not have been admissible against him for any purpose. To support this argument, defendant raised three issues: (1) the detective failed to cease the questioning when defendant invoked his

right to an attorney in the first interview; (2) the detective threatened to arrest him and put him in jail if he did not speak with the investigators causing him to agree to continue talking; and (3) defendant's experiences in his native Guatemala affected his understanding of the interrogation process. Defendant further argued that his admissions made during his second interview were the product of this due process violation, and therefore also should not have been admissible for any purpose. As to the first issue, the Court noted that defendant had indicated both before and after his purported request for an attorney that he wanted to talk with the detectives and that he did not need the assistance of an attorney. His desire to cooperate with the detectives remained unchanged. Therefore, continuing the questioning did not "*overbear* (*defendant's*) *will*." As such, his resulting statements were not involuntary. Similarly, the detective's threat to arrest him had no effect on defendant's obvious desire to talk with the investigators and therefore did not cause an involuntary statement. "The sole cause appearing in the record for defendant's cooperation during the interview was his desire to exculpate himself." Absent a "*causal link*" between the detective's threat and defendant's stated desire to talk with the detectives, there is no constitutional coerciveness. Lastly, whatever effect defendant's experiences in Guatemala might have had on his beliefs are irrelevant to the issue of voluntariness. For a statement to be found involuntary, coercion must be shown to have occurred at the hands of the law enforcement officers involved. "Due Process . . . is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion." Because nothing was done in defendant's first interview that would have made his statements involuntary, the Court further concluded that his admissions made at his second interview could not have been the product of any improper prior interrogation, and were therefore also admissible, at least for purposes of impeachment.

NOTE: First, note that the Supreme Court did not discuss, because defendant had waived the issue, whether he had invoked his right to counsel under *Miranda*. The court merely discussed the circumstances of defendant's statements about an attorney (not concluding either way whether he actually invoked) in the whole context of his claim regarding voluntariness. Second, it should also be noted that the officers need not have given *Miranda* advisements at all in this case. As was made very clear under the facts of this case, defendant was never in custody, one of the requirements for a *Miranda* advisement. Indeed, the officer's unnecessary recital of the *Miranda* advisement is what raised the whole issue regarding defendant's possible invocation of his right to counsel. Third, as to the interrogation tactics used, despite the Supreme Court's finding that it was a non-issue, it is generally not recommended that you follow up a suspect's request for an attorney with a threat to turn a non-custodial situation into an arrest. Any subsequent waiver under these circumstances is immediately going to be suspect, as it was in this case.

NOTES:

People v. Pilster

(2006) 138 Cal.App.4th 1395

SUBJECT: Miranda and Custody

RULE: Handcuffing a suspect at the scene of a crime creates an "*assumption*" that he is in custody for purposes of *Miranda*, absent any other evidence to the contrary.

FACTS: Defendant and his friends were patronizing a Laguna Beach brewery at about 1:00 a.m. one morning, doing whatever Laguna Beach yuppies do at 1:00 a.m. in those places, when the victim-to-be, Stephen Hurley, walked in. While the various accounts differed, it was agreed that defendant and Hurley physically bumped into each other. This resulted in a Laguna Beach, yuppie-style confrontation where both parties felt obligated to engage in a little machismo-induced chest pounding. (It's kind of a "*man thing*.") A couple of "*what's your problem*?," "*I don't like the way you're looking at me*," and "*let's step outside and settle this like men*," were exchanged. Eventually, defendant's buds, an equal number of Hurley's buds, and a couple of brewery bouncers, got involved in a certain amount of "grabbling." Taking advantage of the distraction, defendant, experiencing a momentary, alcohol-induced flash of bravery, blindsided Hurley with a beer bottle across the head. The resulting wound later took some 6 sutures to close. The responding Laguna Beach police officers immediately separated the warring parties, sitting defendant down on the curb outside. He remained there like a good boy for about three minutes before he was handcuffed by a Laguna Beach police officer. A police sergeant approached defendant a few minutes later and questioned him as to the events of the evening. Defendant, although playing down his culpability, made certain incriminating admissions. At no time was he advised of his *Miranda* rights. Upon being charged in state court with assault with a deadly beer bottle, defendant testified to a version of the facts that included a denial that he had hit Hurley at all. The prosecution, in rebuttal, presented the testimony of the sergeant describing defendant's statements to him that he had at least swung the beer bottle (although defendant claimed it was a water bottle; Laguna Beach yuppies apparently drink bottled water in their breweries; not beer) at Hurley, and even "possibly" hit him with it. The defense requested that because defendant had been questioned while in custody, but never *Mirandized*, the jury be instructed that the sergeant's testimony could be considered on the issue of defendant's credibility only, and not as substantive evidence of his guilt. (See CALJIC No. 2.13.1; now CALCRIM No. 356) The trial judge, ruling that defendant had been "*detained*" only and that a *Miranda* admonishment and waiver were therefore unnecessary, declined to so instruct the jury. Defendant was convicted and appealed.

HELD: The Fourth District Court of Appeal (Div. 3) held that defendant had in fact been in custody when questioned, and that the trial court therefore erred when it failed to give the requested limiting jury instruction. However, finding the error to be "harmless," defendant's conviction was affirmed. The law is clear that statements obtained from an in-custody criminal suspect who has not been advised of, and waived, his *Miranda* rights, are *not* admissible against him at trial in the People's case-in-chief. However, so long as the defendant's statements were not otherwise involuntarily obtained, they *are* admissible in the People's rebuttal case for purposes of impeachment should defendant testify in a manner that is inconsistent with what he told the interrogating officers. (*Harris v. New York* (1971) 401 U.S. 222.) In this case, the prosecution presented the testimony of the police sergeant in its rebuttal case, contradicting defendant's denial that he hit Hurley with a bottle. If when the sergeant questioned defendant at the scene he was "*in custody*," then defendant was entitled to have the jury instructed that this rebuttal evidence could only be considered on the issue of his credibility, and not as substantive evidence of his guilt. The issue here,

therefore, is whether defendant was "*in custody*." The trial court ruled that he was not. The appellate court disagreed. The test for determining whether a person questioned by police is "*in custody*" is an objective one: "Would a reasonable person interpret the restraints used (if any) by the police as tantamount to a formal arrest?" The answer to this question can only be resolved by considering the "*totality of the circumstances*," taking into account the following factors: (1) whether the suspect had been formally arrested; (2) absent a formal arrest, the length of the detention; (3) the location; (4) the ratio of officer(s) to suspect(s); (5) the demeanor of the officer(s), including the nature of the questioning; (6) whether the suspect agreed to the interview and was informed he or she could terminate the questioning; (7) whether the police informed the person he or she was considered a witness or a suspect; (8) whether there were restrictions on the suspect's freedom of movement during the interview; (9) whether the police officers dominated and controlled the interrogation or were aggressive, confrontational, and/or accusatory; (10) whether they pressured the suspect; and (11) whether the suspect was arrested at the conclusion of the interview. No one factor is controlling. In this case, defendant was not formally arrested. He was detained only 3 to 5 minutes before questioning, and then was questioned by only one officer while sitting on the sidewalk in front of the bar. Also, the questioning was done in a conversational tone without any confrontational questions or pressure. *However*, defendant was never informed that he was not under arrest, was not a suspect, or that he didn't have to answer questions. In fact, he was formally arrested immediately afterwards. "*Most important(ly)*," defendant remained in handcuffs the entire time. In the Court's opinion, these circumstances were "tantamount to a formal arrest." In reaching this conclusion, the Court rejected as irrelevant case law that allows for handcuffing when necessary to defuse a potentially dangerous situation without necessarily converting a detention into an arrest, noting that such cases involve a Fourth Amendment seizure issue. "In contrast, Fifth Amendment *Miranda* custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest." Per the Court, when the police handcuff a person immediately upon arrival, it generates an "*assumption*" that the suspect is in custody for purposes of *Miranda*. Nothing was said or done subsequent to defendant being placed in handcuffs to negate this assumption. Defendant, therefore, should have been read his *Miranda* rights and a waiver obtained before being questioned.

NOTE: This analysis appears suspect. After listing some eleven factors to consider, the Court seems to put just about all its eggs into the "handcuffing" basket, totally ignoring the counterbalancing effects of factors 1 through 5, 9 and 10. However, the Court's discussion about "*custody*" is instructive. It clarifies that there is a different "*custody*" analysis under the Fifth Amendment, for purposes of *Miranda*, than under the Fourth Amendment, for purposes of a detention or arrest. The former (Fifth Amendment-*Miranda*) is analyzed from the perspective of what a reasonable person in the suspect's shoes would have believed, while the latter (Fourth Amendment, search and seizure) is evaluated from the perspective of what is reasonable for the officers to do under the circumstances, including a consideration of the safety issues. The net result might be a finding that a suspect is in custody for purposes of *Miranda*, but only detained for purposes of the Fourth Amendment; a conclusion that is contrary to the general rule that detentions don't require a *Miranda* admonishment. Also note the interesting comment, relegated to a footnote (fn. 1) for some reason, that the test for "*custody*" for purposes of *Miranda* "is *not* whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with a formal arrest." (Italics in original) People who have been merely detained are not "*free to leave*," but do not necessarily believe they are about to go to jail. Under such a circumstance, *Miranda* does not apply.

NOTES:

People v. Viray

(2005) 134 Cal.App.4th 1186

SUBJECT: Sixth Amendment Right to Counsel; Filing of a Complaint

RULE: The filing of a complaint triggers a defendant's Sixth Amendment right to counsel.

FACTS: Defendant visited her 85-year-old aunt, the victim, in Seaside several times a year, periodically staying with and caring for her during periods of illness. The victim owned three lots in Seaside, upon two of which her home was situated. The third lot had a rundown "shack" on it. When the victim decided that she wanted to deed the property with the shack to defendant for the defendant to repair or replace, and to eventually move into, defendant prepared a deed ostensibly for that purpose. However, she instead listed in the deed the two properties on which the victim lived. When it was noticed that the deed contained the tax numbers for the two properties instead of for the shack, the "error" was corrected in defendant's presence. However, the property description, which was the legally operative language for conveyancing purposes, still referred to the victim's house. At some point before the victim signed the documents, the property tax numbers for the victim's house were again added. The victim, therefore, deeded her house to defendant. A year later, an estate planning attorney noticed that the victim had unknowingly conveyed her house to defendant. Defendant refused to quitclaim the house back to the victim when contacted by the attorney, resulting in the initiation of a criminal investigation. When questioned by police, defendant insisted that her aunt had intended to give her the house. A Penal Code section 368, subdivision (e), (financial elder abuse) complaint was filed in Monterey County. On the day of defendant's scheduled arraignment, the out-of-custody defendant was interviewed by the assigned deputy district attorney and a D.A. investigator. Defendant verified that she did not yet have an attorney. She was never advised of her Sixth Amendment right to the assistance of counsel or asked for a waiver of that right. She was later arraigned and an attorney was appointed. At trial, the taped and transcribed interview with the DDA and his investigator was admitted into evidence against her without objection from the defense. The trial judge, sitting as the trier-of-fact, found her guilty. She appealed, arguing that because a complaint had been filed, her Sixth Amendment right to an attorney applied at the time of her interview with the DDA.

HELD: Although agreeing that her Sixth Amendment right to an attorney had been violated, the Sixth District Court of Appeal affirmed her conviction, finding the error to have been waived. It is clear that a criminal suspect's right to counsel, under the Sixth Amendment, becomes effective upon the initiation of criminal proceedings by way of a "*formal charge, preliminary hearing, indictment, information, or arraignment*." The numerous cases that have quoted this familiar phrase do not mention the legal effect of filing a "*complaint*." This is because in many jurisdictions a criminal prosecution is commenced upon the filing of an information, a grand jury indictment (in federal practice), a preliminary hearing or an arraignment. A complaint is most often used merely as a vehicle by which a sworn affidavit justifying the obtaining of an arrest warrant is brought before a court. In contrast, California begins the bulk of its criminal prosecutions by the filing of a formal complaint. It is when the complaint is filed that the investigatory process melds into the accusatory stage. In California, once a complaint has been filed, the criminal process can no longer be terminated at the prosecutor's sole discretion, at least without application first being made, and justified, to a court. As such, it is clear that under California law the filing of a complaint, as the initiation of "*formal charge*(*s*)," is the beginning of "*adversary judicial proceedings*." It is at this stage, therefore, that a defendant's Sixth Amendment right to the assistance of counsel is triggered. In this case, the defendant was not interviewed until after the filing of the complaint. The fact that she was entitled to the assistance of an attorney at that point was not mentioned to her, and no waiver of this right was obtained. Therefore, her Sixth Amendment right to counsel was violated when interviewed by the DDA

and his investigator. However, because defense counsel failed to object to the admission into evidence of her statements, any error was waived. The Court also rejected defendant's argument that the prosecutor's actions in violating the defendant's Sixth Amendment right to counsel was so "*egregious*" that the case should be dismissed. Absent some evidence that the prosecutor knowingly violated the defendant's rights, dismissal is not warranted. Lastly, the Court declined to rule that defendant's attorney was incompetent for not objecting to the use of her statements. On the record on appeal (incompetence issues generally being handled through a writ of habeas corpus, which would include the taking of evidence on the issue), it cannot be said that defense counsel didn't have a tactical reason for not objecting.

NOTES:

Davis v. Washington

(2006) 126 S.Ct. 2266

SUBJECT: Hearsay Statements and the Sixth Amendment Right to Confrontation

RULE: Statements made in a 9-1-1 call by a victim while a crime is occurring are *not* "*testimonial*," and are therefore *admissible* at trial when that victim is later unavailable to testify. Statements made during the subsequent investigation, however, *are testimonial* and *inadmissible* when the victim is unavailable to testify and the defendant has not yet had an opportunity to cross-examine her.

FACTS: Two cases: *#1*. In Washington state, Michelle McCottry called 9-1-1 and hung up when the police emergency operator answered. The operator called her back and asked her what was going on. Michelle complained that defendant Davis was "jumping on me again," using his fists. Michelle was able to identify Davis by name. Davis fled the scene as Michelle was talking to the 9-1-1 operator. He was later charged with a felony violation of a domestic violence no-contact court order. However, Michelle failed to appear for Davis's trial. In her absence, the prosecutor presented the testimony of the responding officers who described Michelle's visible injuries and her emotional state at the time. A tape of the 9-1-1 call from Michelle, identifying Davis as the one who beat on her, was also admitted into evidence. Davis appealed from his conviction, arguing that use of the 9-1-1 tape violated his Sixth Amendment right to confront his accuser. Davis's conviction was affirmed by the Washington courts. Certiorari was granted by the United States Supreme Court.

#2. In Indiana, police responded to a late-night "domestic disturbance" call. They found the "somewhat frightened" victim, Amy Hammon, sitting on the front porch. In answer to the officers' inquiry, Amy told them "nothing was the matter." Entering the house with Amy's permission, the officers found a gas heater with its front glass panel broken and pieces of glass on the floor. Defendant Hershel Hammon, contacted in the kitchen, admitted to having had an argument with his wife, but denied that it had become physical. With Hershel detained in the kitchen, one of the officers interviewed Amy separately. She then admitted that during the argument, Hershel Hammon had broken the heater, some lamps and the telephone. He also "tore up" the family van so she couldn't leave. He then pushed her down onto the floor, shoving her head into the broken glass from the heater, and punched her twice in the chest. She filled out a sworn affidavit to this effect. Hammon was charged in state court with "domestic battery" and a probation violation. Amy failed to appear for the trial. Over Hammon's objections, the prosecution was allowed to present the officer's testimony about what Amy had told him, classifying her statements under the "excited utterance" exception to the hearsay rule. Amy's affidavit was also admitted into evidence, the trial court ruling that it qualified under the "present sense impression" exception to the hearsay rule. Convicted as charged, Hammon's conviction was upheld on appeal. Certiorari was granted by the United States Supreme Court and joined with the Davis case.

HELD: The United States Supreme Court, in a near-unanimous decision, upheld Davis's conviction but reversed the conviction in Hammon's case. The respective victims' statements to police (which included the tape of the recorded 9-1-1 call in *Davis* and the written affidavit in *Hammon*, as well as what the victims told the responding police officers) as they related to and described the actions of the defendants in both cases, are "*hearsay*" when testified to by the officers who overheard such statements, or, with the affidavit, when it

is offered into evidence. When such statements come within one of the recognized hearsay exceptions, however, they *may be* (depending upon a legal analysis not relevant here) admissible in evidence. A major limitation on the admissibility of such statements, however, is when use of the statements violates the defendants' Sixth Amendment right to confront his accusers. The Supreme Court in *Crawford v. Washington* noted that admission of such hearsay statements does in fact violate a defendant's Sixth Amendment rights when (1) the "*declarant*" (i.e., the respective victims in these cases) is unavailable to testify, (2) the defendant has not yet had the opportunity to cross-examine that witness, *and* (3) the statements are "*testimonial*" in nature. In the present case, both victims failed to appear for trial. In both cases, the defendant had not yet had an opportunity to cross-examine the victim. The only issue left is whether the statements were "*testimonial*." Although *Crawford v. Washington* gave some guidance in what is, and what is not, "*testimonial*," it failed to specifically define the term. At least partially filling this gap, the Court here provided the following distinction: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (In footnote #1, the Court also adds that the term "*interrogation*" is not to be taken literally. This term would include what might more often be referred to as a "*witness interview*.") Based upon these standards, the Court found the 9-1-1 call to the police emergency operator (who, for purposes of this case, was found to be a police agent) in the *Davis* case to be *non-testimonial*. This conclusion was based upon the following: (1) The victim was speaking of events as they were actually occurring; (2) the victim was facing an on-going emergency; (3) the statements elicited from the victim were necessary to enable the police to resolve the present emergency rather than simple to learn what had happened in the past; and (4) the formality of the situation was less than where a victim is interviewed about a past event. In the *Hammon* case, however, the officer's interview of the victim, as well as her sworn affidavit describing her husband's acts, were found to be testimonial based upon the following: (1) The interview of the victim was part of an investigation into possibly past (even thought very recent past) criminal conduct; (2) there was no emergency in progress; (3) the interview was to determine not what was happening, but rather what *had* happened; and (4) the primary, if not sole, purpose of the interview was to investigate a possible crime. The admission into evidence of Amy Hammon's statements, therefore, violated *Crawford* and the Sixth Amendment. Lastly, in response to the suggestion that the rules of admissibility should be loosened up a little in domestic violence cases, the Court, while declining to do so, noted that the same end can be accomplished through application of the so-called "*Rule of Forfeiture by Wrongdoing*." Under this theory (codified into federal law by Federal Rule of Evidence 804(b)(6), and a part of California state jurisprudence through case law), statements that might otherwise be classified as testimonial, and therefore inadmissible under *Crawford* and the Sixth Amendment, may be used anyway if the prosecution can prove by a preponderance of the evidence that the defendant did something to cause the unavailability of the victim or witness. "(W)hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require the courts to acquiesce." The Court therefore upheld Davis's conviction, but remanded the *Hammon* case back to the trial court for further proceedings, including a determination of whether the "*Rule of Forfeiture by Wrongdoing*" might apply.

NOTES:

Thompson v. County of Los Angeles

(2006) 142 Cal.App.4th 154

SUBJECT: Dogs and Deadly Force

RULE: The proper use of a trained police dog does not constitute the use of deadly force.

FACTS: Appellant in this civil case was not having a good day. His first attempt to commit a carjacking was thwarted by the victim when he pulled the coil wire, killing the engine. A second attempt to steal another car ended when the victim telephoned for help. Then, appellant's attempted robbery of a 7-Eleven store ended when a responding deputy arrived just as appellant ducked into an alley and jumped over a block wall. With the deputy at one end of the alley and some neighborhood youths blocking the other end, another deputy responded with his canine partner. When deputies learned that appellant was a parolee with a prior weapons-related offense, they decided to send the dog in after him. After warnings by loudspeaker and a helicopter, the dog, on a 60-foot leash, was used in the search. The dog located appellant hiding under a car in a carport. Deputies ordered appellant to come out. When he started to comply, the dog, who was out of his handler's sight, bit appellant in the leg. Appellant yelled to get the dog off of him and struggled to remove the dog himself. Deputies told appellant to quick struggling but he continued to fight with the dog, choking him with his collar. Because appellant would not quit resisting the dog, the deputies struck him with their flashlights on his arm, shoulder, and leg. The dog was eventually pulled away from appellant, and appellant was subdued. Appellant ended up spending four days in the hospital with a large laceration to his lower left leg and backside, as well as dog bites on his hands. He later developed an infection that required daily care for several months. Long term, he lost some control over his left foot, had significant tissue loss, and suffered from prominent deformities and scar tissue that negatively affected his mobility. Appellant sued the deputies in state court, pursuant to 42 U.S.C. § 1983, for excessive force and negligence and presented his case to a jury. Appellant requested several jury instructions which included references to "deadly force" as "force which is reasonably capable of causing serious bodily injury or death." Denying these requests, the judge instructed the jury instead on the use of unreasonable and excessive force, finding that the pertinent inquiry was whether the deputies' use of force was reasonable under the circumstances; i.e., "(f)orce is not excessive if it is reasonably necessary under the circumstances to make a lawful arrest," and that the appellant had the burden to show that the sheriff's deputies used excessive force. The jury was also instructed that the use of a trained police dog to bite a fleeing or hiding criminal suspect constituted a police use of force. However, the jury was to consider whether that force was reasonable under the circumstances known to the officers at the time the force was used. The jury found that unreasonable force was not used. Appellant appealed.

HELD: The Court of Appeal affirmed. Excessive force claims, when evaluating an arrest or seizure by law enforcement, are analyzed under the objective reasonableness standard of the Fourth Amendment. This requires a consideration of the facts and circumstances of each particular case including: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The jury was so instructed. Citing *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, appellant argued that the use of a police dog constituted force likely to produce death or serious bodily injury and that he was entitled to have the jury instructed accordingly. However, the Court here noted that *Smith* did no more than hold that the use of an improperly trained dog, or the use of a dog with the intent to cause death or serious bodily injury, might constitute the use of deadly force. However, the "*great weight*" of authority is that the proper use of a trained

police dog does not constitute deadly force. Where a criminal suspect suffers no more than non-life threatening injuries, as in this case, particularly where the bulk of the injuries were caused by appellant himself by fighting with the dog despite efforts to get him to stop, a jury should not be instructed that the use of the dog constituted deadly force.

NOTE: This case is important in off-setting the *Smith* case, cited above and covered in last year's Legal Update, which did in fact create a great deal of confusion as to whether the use of a police dog constituted the use of "deadly force."

NOTES:

People v. Smith

(2006) 142 Cal.App.4th 923

SUBJECT: Miscellaneous: Burglary of One's Own Residence

RULE: A homeowner can burglarize his own home while court orders barring him from the residence are in effect.

FACTS: Defendant and Geraldine were married and lived together in a home purchased jointly (i.e. "community property") in Blythe. Late one night defendant attacked Geraldine and injured her. She reported the physical abuse to the police, and defendant was arrested. Temporarily moving in with her sister, Geraldine got a restraining order to keep defendant away from her and a separate court order removing him from their home. When defendant got out of jail, an attempted suicide earned him a 3-day stay in a mental hospital. Claiming to have no clothes or money upon his release from the hospital, defendant sought shelter in a storage shed behind their home. Noticing that Geraldine had returned home, defendant broke into the house by throwing a propane canister through a rear sliding glass door. Defendant then proceeded to attack Geraldine, hitting, kicking, biting, and choking her, and threatening to kill her as he held a kitchen knife to her throat. He eventually forced her into her car in the garage. When he couldn't get the electric garage door opener to work (Geraldine having changed the code), he backed the car right through the garage door. As defendant drove, Geraldine opened her door and, during a struggle, was ejected from the car. Defendant stopped, walked back to her and struck her in the face several times with his fists, and banged her head against the curb five or six times, threatening again to kill her. She eventually lost consciousness. Passersby intervened, causing defendant to stop. As he attempted to drive away, defendant drove into a parked tractor-trailer, injuring his head. He was subsequently arrested by the police. Geraldine lived, but suffered some very serious injuries. Defendant was tried and convicted of premeditated attempted murder, spousal abuse, kidnapping, making criminal threats and residential burglary. Sentenced to prison for 34-years-to-life, defendant appealed.

HELD: Except to reduce his sentence by six years due to a sentencing error, the Fourth District Court of Appeal (Div. 2) otherwise affirmed. Defendant's primary argument on appeal was that the residential burglary conviction cannot stand because it is a rule of law that a person cannot burglarize his own home. (*People v. Gauze* (1975) 15 Cal.3d 709.) This is because a burglary requires that the entry invade a possessory right in the building and that it be committed by someone who has no right to be in the building for an unlawful purpose. Typically, a person has an absolute right to enter his own residence. But in this case, although defendant retained a possessory interest in the home, he did not have an absolute right to enter as a lawful occupant while Geraldine was there. Geraldine had court orders (1) preventing him from contacting her and (2) giving her the temporary right to be the home's sole occupant. Defendant's entry was in violation of both these orders. Because of these limitations on his right to enter his home, defendant did commit a burglary when he entered the house for the purpose of committing a felony upon his wife.

NOTES:

People v. McDonald

(2006) 137 Cal.App.4th 521

SUBJECT: Miscellaneous - Public Urination

RULE: Officers may stop someone who has urinated in public for the crime of committing a public nuisance in violation of Penal Code Section 370/372.

FACTS: An officer saw defendant urinating in a parking lot of restaurant at eleven o'clock in the morning. The restaurant was closed and the parking lot was empty save for a vehicle that appeared to belong to defendant's acquaintance. The officer approached the defendant, intending to cite him for urinating in the parking lot. The defendant was unable to provide any written identification but verbally gave identifying information. Defendant was placed under arrest and searched incident to the arrest. The officer found defendant in possession of six rocks of cocaine. Although the officer wasn't sure which actual code section had been violated by defendant, his arrest report reflected defendant was cited for littering in violation of Penal Code section 374.4(b). The defendant challenged the stop, claiming he did not violate any law.

HELD: Although the court found that urinating did not constitute littering, the court concluded the officer properly detained the defendant because urinating at that location constituted a "public nuisance" in violation of Penal Code section 370 and 372.

NOTES: The court recognized that there "there might well be circumstances in which a single, discreet act of public urination would not violate sections 370 and 372" citing, as an example, "a hiker responding to an irrepressible call of nature in an isolated area in the backwoods[.]" The court rejected the idea that defendant might also have been in violation of Penal Code section 375 (dealing with discharge of irritating, sickening, or nauseous substances). However, the court said nothing about whether the defendant could have been arrested for violating a local city ordinance prohibiting public urination and it should be assumed that enforcing such local ordinances would be proper.

NOTES:

Kim v. Superior Court

(2006) 136 Cal.App.4th 937

SUBJECT: Prostitution; Words Alone as "An Act in Furtherance Thereof

RULE: For purposes of a charging an agreement to engage in prostitution, per Penal Code section § 647, subdivision (b), the necessary element of "an act done in furtherance of the act of prostitution" may be satisfied by defendant's unambiguous and unequivocal words.

FACTS: On May 27, 2005, undercover Los Angeles police officers arrested defendant Jeongrye Kim for agreeing to engage in an act of prostitution, per Penal Code section § 647, subdivision (b). After defendant demurred to the complaint (challenging its legal sufficiency), arguing that it, as written, failed to allege a criminal act, the L.A. City Attorney filed an amended complaint alleging that the agreement was evidenced by the following acts in furtherance of the commission of an act of prostitution: (1) Placing her (defendant's) right index finger on her mouth and telling the undercover officer to be quiet when he asked her if he could have sex with her for a little more money; (2) raising her index finger and saying "one" after the officer asked if he could have sex for $60; (3) stating "yes" after the officer pointed to her groin area and asked if she was clean "down there;" (4) responding "yes" when the officer asked whether she had a condom; and (5) instructing the officer to take off his clothes. The trial court denied defendant's demurrer. Defendant filed a pretrial writ challenging this ruling.

HELD: The Second District Court of Appeal (Div. 7) affirmed. Pursuant to Penal Code section 647, subdivision (b), a person is guilty of "agree(ing) to engage in . . . (an) act of prostitution" only if it can be proved that the defendant committed some act, in addition to the agreement, in furtherance of the commission of the act of prostitution. The issue here was whether words (or "utterances") alone are legally sufficient to satisfy this element of an act done in furtherance of the act of prostitution. In denying defendant's demurrer, the trial court ruled that it was. The Appellate Court agreed. In reaching this conclusion, the Court looked to the legislative history of the section and noted that the Legislature, while not specifying whether a "verbal act" was sufficient, referenced the concepts of criminal attempts and conspiracies in its reasoning. The purpose of including some act in furtherance of the intended target offense is to prevent premature arrests before the defendant's intent to participate in an act of prostitution is clear. In reviewing the applicable case law, the Court here determined that so long as a defendant's verbal acts unambiguously and unequivocally convey that the agreed act of prostitution will occur and moves the parties toward the completion of that act, verbal acts are sufficient to satisfy this element. In this case, the complaint alleged that defendant instructed the undercover officer to undress; "a clear and unequivocal statement directed at completing the agreed-to act of prostitution." The complaint as written, therefore, is legally sufficient to charge the crime of agreeing to commit an act of prostitution.

NOTE: The other statements attributed to the defendant as alleged in the complaint (and as listed as numbers 1 through 4, above) were found to be too ambiguous to constitute an act in furtherance of the act of prostitution. (See fn. 3 of the decision) So the case pretty clearly sets out what you need to do to arrest for, charge in court, and/or convict a defendant of agreeing to commit an act of prostitution.

NOTES: